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No. 87-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NATIONWIDE CORPORATION AND
NATIONWIDE MUTUAL INSURANCE COMPANY,
Petitioners,

v.

HOWING COMPANY AND
DOUGLAS MCLELLAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

The Sixth Circuit extended the contemporary legal context test of *Cannon v. University of Chicago*, 441 U.S. 677 (1979), to create a presumption that virtually every federal statute passed between 1916 and 1975 includes an implied private cause of action for damages. Applying that presumption, the court of appeals implied a damages action in Section 13(e)(1) of the Securities Exchange Act of 1934—the statute regulating proxy statements in more than $20 billion in going-private mergers occurring each year. Oddly, this new approach would render actionable a proxy statement that the court concluded was neither false nor misleading and thus did not violate the antifraud provisions of the securities laws.

The question is: Can the Sixth Circuit enlarge the contemporary legal context test to imply a private damages action in Section 13(e)(1) and nearly all federal statutes passed during a fifty-nine year period where:

(A) that decision directly conflicts with Second Circuit and other federal authority concerning the scope of this Court's holding in *Cannon*;

(B) that decision is directly contrary to this Court's decisions in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), concerning the inability of federal courts to create private damages actions where, as here, the legislative history is silent; and

(C) that decision squarely conflicts with other, better-reasoned federal court opinions relying on *Transamerica* and *Touche Ross* to reject private damages actions under Section 13(e)(1).

PARTIES TO THE PROCEEDINGS

Petitioners Nationwide Corporation and Nationwide Mutual Insurance Company were the appellees in the court of appeals. Respondents Howing Company and Douglas McLellan were the appellants below.

Pursuant to Supreme Court Rule 28.1, petitioners make the following disclosure: Nationwide Corporation is owned by Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company, both of which are mutual insurance companies owned by their respective policyholders. At the present time, the subsidiaries (except wholly-owned subsidiaries) and affiliates of Nationwide Corporation, Nationwide Mutual Insurance Company, or Nationwide Mutual Fire Insurance Company are: Employers Insurance of Wausau A Mutual Company, NGC County Mutual Insurance Company, Global Exchange, Allnations, Inc., International Cooperative Bank Company Ltd., Farzaroli & Davey Administration and Insurance Services, Wausau Lloyds, Bahamas Marine Enterprises, Ltd., Canners Exchange Subscribers, and Treaty Consultants, Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Nationwide Corporation and Nationwide Mutual Insurance Company, respectfully request that a writ of certiorari issue to review the judgment and decision of the U.S. Court of Appeals for the Sixth Circuit, entered August 7, 1987.

OPINIONS BELOW

The opinion of the panel below and Judge Guy's opinion dissenting in part are published at *Howing Co. v. Nationwide Corp.*, 826 F.2d 1470 (6th Cir. 1987), and appear in the appendix at pp. 1a-34a, *infra.*

The September 24, 1987 order denying rehearing and rehearing *en banc* appears at p. 35a, *infra.* The Sixth Circuit's order granting petitioners' application to stay the mandate pending application for a writ of certiorari appears at p. 36a, *infra.*

The district court opinion giving rise to the Sixth Circuit proceedings is published at *Howing Co. v. Nationwide Corp.*, 625 F. Supp. 146 (S.D. Ohio 1985), and appears at pp. 37a-59a, *infra.*

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1987. (1a.) Rehearing and rehearing *en banc* were denied on September 24, 1987. (35a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982). The district court's jurisdiction was invoked under 15 U.S.C. § 78aa and 28 U.S.C. §§ 1331, 1332 (1982), as well as principles of pendent jurisdiction.

STATUTORY PROVISION INVOLVED

Section 13(e)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(e)(1) (1982), enacted in Section 2 of the Williams Act, 82 Stat. 455 (1968), provides:

> It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78*l* of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt
>
> (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and
>
> (B) to prescribe means reasonably designed to prevent such acts and practices.
>
> Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the

protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

STATEMENT OF THE CASE

A. Facts

On December 9, 1982, petitioner Nationwide Corporation issued a proxy statement proposing a merger with a subsidiary of its largest stockholder, petitioner Nationwide Mutual Insurance Company. The proxy statement proposed that Nationwide "go private" and be owned entirely by Nationwide Mutual and its affiliate, Nationwide Mutual Fire Insurance Company. The 14.4 percent of the Nationwide Class A Common stock then in public hands would be purchased for $42.50 per share—a 51.8 percent premium over the $28-per-share market price of the stock.

As the proxy statement discussed, the price of $42.50 was set by independent analysis. (75a-78a, 81a, 84a-86a.) The First Boston Corporation, a leading investment banking firm, was retained to represent the interests of the public stockholders. (Joint Appendix on Appeal ("JA") 606.) After conducting a one-month evaluation of Nationwide's business and operations, First Boston recommended $42.50 per share as a "fair" price. (JA 600, 1214.)

The merger proposal was then reviewed by a special Evaluation Committee, consisting of Nationwide's five independent, outside Class A Directors. That Committee also concluded that the merger price was fair to Nationwide's public stockholders after considering a great number of factors. (76a-77a, 85a-86a.) As the proxy statement truthfully disclosed, the Committee did not adopt any mechanical formula or assign some specific "weight" to each of those factors (some of which were unquantifiable in any event). However, the Committee did place particular emphasis on two factors: the written opinion of

the outside experts, First Boston, and the fact that the merger price represented a significant premium over the then current market price. (86a.) The proxy statement also listed a number of other factors which the Committee deemed important. (*See* 85a-86a.)

The merger was unanimously approved by the full Board of Directors. A majority of the eleven Directors were disinterested in the transaction. The proxy statement was then distributed to the public stockholders. After the district court below denied a preliminary injunction motion to block a vote on the merger, *Efros v. Nationwide Corp.*, 1982-83 Fed. Sec. L. Rep. (CCH) ¶ 99,077 (S.D. Ohio 1983), the transaction was approved by 94.7 percent of the voted *public* shares. Respondents were Nationwide stockholders at the time, but did not bother to vote. The transaction was consummated on March 30, 1983. (JA 696.)

In the district court, respondents advanced a series of changing allegations before settling on a theory. More than two years after the transaction was consummated, they alleged for the first time that the proxy statement violated Section 13(e)(1) of the Securities Exchange Act of 1934. They also continued prior allegations that the proxy statement violated Sections 10(b) and 14(a) of the Securities Exchange Act. Petitioners promptly moved for summary judgment.

On October 18, 1985, the district court granted petitioners' summary judgment motion. In rulings subsequently affirmed by the Sixth Circuit, the district court held that petitioners had not violated Sections 10(b) or 14(a) because Nationwide's proxy statement contained no false or misleading statement. In considering respondents' claims under Section 13(e)(1), the district court assumed without deciding that the statute contained an implied private cause of action, but concluded that the proxy statement satisfied the requirements of the statute and the implementing regulations. In particular, the district court rejected respondents' contention

that the proxy statement failed to sufficiently discuss the net book value, liquidation value, and going concern value of Nationwide's shares, holding that Section 13 (e) (1)

> "merely requires that an opinion [about the merger price] be given and the material factors on which it is based be disclosed." We conclude that defendants satisfied this requirement . . . by listing the factors considered by the Evaluation Committee and by candidly stating that no specific weight was given to any one factor, but of particular importance in the consideration was First Boston's opinion and the fact that the merger price represented a premium over the market price of the stock.

(54a (citation omitted).)

B. The Sixth Circuit's Decision

Respondents appealed to the Sixth Circuit. On August 7, 1987, that court affirmed the dismissal of respondents' Section 10(b) and 14(a) claims. However, the panel majority reversed the ruling on one of respondents' Section 13(e)(1) claims. Judge Guy dissented from the latter ruling.

The court of appeals began its analysis of the Section 13(e)(1) claim by deciding that the statute impliedly creates a private damages action. (8a.) Although acknowledging that the legislative history of the statute is utterly silent on this point (11a), the court reached its conclusion for two reasons.

First, Section 13(e)(1) was enacted in 1968 (as part of the Williams Act) during a fifty-nine year period ending in 1975 when judicial recognition of implied damages actions was in "a heyday of sorts." (11a.) Adverting to the contemporary legal context test announced in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Sixth Circuit created a presumption that any statute enacted during that era includes an implied damages

action absent explicit legislative history to the contrary. Thus, the court held that Congressional silence supported an inference of private actions in all such statutes. (9a, 11a-12a.) As shown below, this reasoning dramatically expands the holding of *Cannon* and directly conflicts with federal precedent concerning the scope of the contemporary legal context test, as well as this Court's decisions restricting creation of implied causes of action where the legislative history of a statute is silent on the issue. *See* pp. 9-16, *infra.*

Second, the Sixth Circuit emphasized its mistaken belief that the language of Section 13(e)(1) was "identical" to Section 14(a) of the Securities Exchange Act—a provision this Court held contained an implied private damages action in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). (11a.) As shown below, on this point the appellate court was just flat wrong. Section 13(e)(1) was not patterned after Section 14(a). *See* pp. 16-18, *infra.*

After deciding that Section 13(e)(1) contains a private damages remedy, the Sixth Circuit considered the sufficiency of Nationwide's proxy statement. All three panel members concluded, as a matter of law, that the statement contained no falsehoods or half-truths—in other words, that Nationwide had truthfully disclosed everything it thought important in finding $42.50 per share to be a fair price. As a result, Nationwide committed no fraud. (24a.) But two panel members relied on the instructions to SEC Schedule 13E-3 (the form published by the SEC for use in connection with going-private mergers) to find that Nationwide was required to do more by assigning specific weights to, and then analyzing various alternative valuation methods. (16a-19a.) No evidence indicates that anyone connected with Nationwide believed that any of these alternative methods produced a price higher than $42.50 per share. Indeed, even respondents' expert conceded that these other

methods produced a lower price than the method actually used. (JA 782-83, 1093.)

Judge Guy dissented from this part of the majority opinion. He noted that nothing in Schedule 13E-3 or its instructions required Nationwide to discuss specific alternative valuation methods. (26a-27a (Guy, J., dissenting).) Instead, the instructions merely refer to various factors which might be considered. 17 C.F.R. § 240.13e-100 (1987), Instruction to Item 8. Judge Guy also concluded, as did the district court, that the proxy statement was sufficient because it truthfully "sets forth clearly and in reasonable detail the factors upon which [Nationwide] relied" in finding $42.50 to be a fair price. (28a; *see* 54a.)

REASONS FOR GRANTING THE WRIT

The petition's challenge to the Sixth Circuit's recognition of an implied cause of action under Section 13(e)(1) of the Securities Exchange Act meets the traditional standards set forth in Supreme Court Rule 17.1(a) and (c) for exercise of this Court's jurisdiction. Moreover, the issues raised by the petition have great significance for those involved in going-private mergers and the public at large.

First, the Sixth Circuit dramatically expanded the contemporary legal context test of *Cannon v. University of Chicago* in direct conflict with the Second Circuit's decision in *Siebert v. Conservative Party*, 724 F.2d 334, 336-37 (2d Cir. 1983), *cert. denied*, 466 U.S. 980 (1984), as well as a leading Williams Act decision, *Jacobs v. Pabst Brewing Co.*, 549 F. Supp. 1050 (D. Del. 1982). Under the Sixth Circuit's approach, virtually all of the thousands of statutes passed before this Court's 1975 decision in *Cort v. Ash*, 422 U.S. 66 (1975), are presumed to create a private damages action solely because of the date of their enactment. But under the Second Circuit and *Jacobs*' decisions, the date of a statute's en-

actment does not determine whether an implied private action exists; instead, the lower courts remain bound to current Supreme Court guidelines concerning the creation of implied actions regardless of a statute's enactment date. *See* Part A, *infra.*

Second, the Sixth Circuit's establishment of an implied damages action on the basis of Congressional silence is directly contrary to this Court's decisions in *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11 (1979), and *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979). *See* Part B, *infra.*

Third, the Sixth Circuit's recognition of an implied cause of action under Section 13(e)(1) firmly establishes a split of the lower federal courts on that precise issue. *Compare* 8a *and Fisher v. Plessey Co.,* 1982-83 Fed. Sec. L. Rep. (CCH) ¶ 99,246 (S.D.N.Y. 1983) *with Kalmanovitz v. G. Heileman Brewing Co.,* 595 F. Supp. 1385, 1393-95 (D. Del. 1984) ("this Court finds that no private right of action for money damages exists under Section 13(e)"), *aff'd,* 769 F.2d 152 (3d Cir. 1985) *and Berg v. First American Bankshares, Inc.,* 1984-85 Fed. Sec. L. Rep. (CCH) ¶ 92,011, at 91,012-13 (D.D.C. 1985) ("holding that under Section 13(e) of the Securities Exchange Act, a private cause of action is not implied"), *aff'd,* 796 F.2d 489 (D.C. Cir. 1986). *See* Part C, *infra.*

The numerous decisions of this Court granting certiorari to review opinions implying private causes of action in federal statutes demonstrate the critical importance of such questions, even in the absence of splits among the lower federal courts.[1] Because of the enor-

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[1] *See, e.g., Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134 (1985); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 453 U.S. 1 (1981); *California v. Sierra Club,* 451 U.S. 287 (1981); *Universities Research Ass'n v. Coutu,* 450 U.S. 754 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444

mous significance of the securities transactions regulated by Section 13(e)(1)—there were over $20 billion in going-private mergers last year alone—and the far-reaching legal implications for other statutes of the Sixth Circuit's extension of *Cannon*, this Court should grant the petition for a writ of certiorari.

THIS COURT'S DECISIONS IN *CANNON*, *TRANSAMERICA* AND *TOUCHE ROSS* DO NOT PERMIT CREATION OF AN IMPLIED CAUSE OF ACTION FOR DAMAGES UNDER SECTION 13(e)(1) OF THE SECURITIES EXCHANGE ACT.

A. This Court's Guidance Is Needed To Reconcile The Courts Of Appeals' Divergent Understandings Of The Contemporary Legal Context Test Announced In *Cannon*.

In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), this Court announced a narrow rule of statutory construction. Courts could rely on the "contemporary legal context" to presume Congress intended an implied private damages action under a federal statute where two factors were present: (1) the statute is "patterned after" a previously enacted law; and (2) there was overwhelming authority for recognition of an implied right under the predecessor law.[2]

In contrast to that narrow rule, the Sixth Circuit expanded *Cannon's* contemporary legal context test into a broad presumption that virtually all federal statutes

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U.S. 11, 14 (1979) (existence of implied cause of action is an "important federal question"); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 562 & n.1 (1979) (certiorari granted in five cases raising issue of implied causes of action in one term alone).

[2] *Cannon*, 441 U.S. at 695-96. For example, the existence of a private cause of action under the predecessor statute in *Cannon* had been "squarely decided" in a Fifth Circuit opinion which had been followed by "at least a dozen other federal courts" when Congress enacted the new law. *Id.* at 696.

enacted between 1916 and 1975 include implied damages actions. According to the *Howing* panel, the mere fact that a statute was enacted during the fifty-nine year period when judicial recognition of private suits was in its "heyday"—from *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33 (1916) until *Cort v. Ash*, 422 U.S. 66 (1975)—requires that a private cause of action be recognized absent explicit legislative history to the contrary. (11a-12a; *see also* 8a-9a.) As the Sixth Circuit stated:

> [B]ecause the rule announced by *Cort* was such a departure from existing law, there has been some reluctance to apply it to legislation enacted prior to that decision. According to *Cannon*, Congress is entitled to rely on the "contemporary legal context" in which it acts. When Congress passed legislation prior to *Cort*, that context would presume a private remedy if the statute and its history were otherwise silent.

(9a (citations omitted).)

The Sixth Circuit's understanding of *Cannon* conflicts directly with the Second Circuit's refusal to broaden *Cannon* into a test which focuses only on the date of a statute's enactment in *Siebert v. Conservative Party*, 724 F.2d 334 (2d Cir. 1983), *cert. denied*, 466 U.S. 980 (1984). Appellants in *Siebert* argued that the contemporary legal context test requires that courts apply different standards for implying a cause of action depending on when a statute was enacted. 724 F.2d at 336-37. Under this approach, the rigorous analysis announced in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), which disfavors the implication of private damages actions on the basis of Congressional silence, would not be applied to any statute enacted before 1979. 724 F.2d at 336-37. The Second Circuit squarely rejected that argument as an attempt to distort *Cannon* into a rule "that the law must be frozen in time for pur-

poses of determining whether Congress intended an implied right of action to exist." *Id.* at 337. *Cannon*

> merely restate[s] the canon of statutory construction that Congress is presumed to be aware of the judicial background against which it legislates. *A lower federal court, however, must employ the analysis currently required by the Supreme Court for making the determination of Congressional intent.*

Id. (emphasis supplied). The date of a statute's enactment does not control whether a private damages action exists thereunder. *Id.*

Similarly, the Sixth Circuit's understanding of *Cannon* as creating a broad presumption that statutes passed in certain years automatically include private damages actions is directly contrary to a Delaware district court decision involving another provision of the Williams Act. *See Jacobs v. Pabst Brewing Co.*, 549 F. Supp. 1050 (D. Del. 1982). Like the Sixth Circuit, the plaintiffs in *Jacobs* tried to predicate an implied damages action on the fact that the Williams Act was enacted in 1968. Invoking *Cannon*, they argued that a "liberal judicial approach to implied private rights of action was the 'contemporary legal context' in which Congress enacted the Williams Act and Congress thus intended for the courts to continue to imply such a cause." *Id.* at 1058. Again this distortion of the contemporary legal context test was rejected:

> The Court must reject this argument because the Supreme Court has indicated that before courts may imply a cause of action based on the contemporary legal context in which Congress enacted a statute, they must find judicial interpretation of the specific statutory provisions in question. *The mere fact that the Supreme Court was more likely to imply a cause of action is insufficient.*

Id. (emphasis supplied).

The Sixth Circuit's broad reading of *Cannon* is also inconsistent with decisions of the Third and Ninth Cir-

cuits that strictly apply both requirements of the contemporary legal context test. In situations where either (1) the statutory language is not patterned after a predecessor statute or (2) there is not overwhelming judicial authority for recognition of a private damages action under the predecessor statute at the time of the new statute's enactment, no cause of action can be implied based on *Cannon*. *See In re Washington Public Power Supply System Securities Litigation*, 823 F.2d 1349, 1356-57 (9th Cir. 1987) (*en banc*); *Borough of Ridgefield v. New York Susquehanna & Western R.R.*, 810 F.2d 57, 60 (3d Cir. 1987); *Walck v. American Stock Exchange, Inc.*, 687 F.2d 778, 787 (3d Cir. 1982), *cert. denied*, 461 U.S. 942 (1983); *Scientex Corp. v. Kay*, 689 F.2d 879, 884 (9th Cir. 1982). In contrast, the *Howing* panel's reliance on the date of a statute's enactment would read these limitations out of the *Cannon* holding.

The extension below of the contemporary legal context test has far-reaching implications going well beyond Section 13(e)(1) and the securities laws. The 1916-1975 period identified as the "heyday" of judicial recognition of implied causes of action was also marked by the greatest upsurge in the enactment of legislation in American history. Many of these statutes have already been held not to create private causes of action in decisions by this Court[3] and the federal courts of ap-

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[3] *See Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (Section 409(a) of Employee Retirement Income Security Act of 1974 provides no implied cause of action for extra-contractual damages caused by improper processing of benefit claims); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (no implied cause of action under Federal Water Pollution Control Act of 1948 or Marine Protection, Research, & Sanctuaries Act of 1972); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981) (no implied cause of action for contribution under Equal Pay Act of 1963 or Title VII of Civil Rights Act of 1964); *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981) (no implied cause of action under Section 1(a) of Davis-Bacon Act of 1931); *Kissinger v. Reporters Committee*, 445 U.S. 136, 147-50

peals.[4] Those decisions evince no special willingness to presume private actions in statutes enacted prior to 1975.[5] But under the Sixth Circuit's reasoning, any of the thousands of statutes enacted during that period

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(1980) (no implied cause of action under Federal Records Act of 1950 or Records Disposal Act of 1968); *Transamerica Mortgage Advisors*, 444 U.S. at 16-25 (no implied damages action under Section 206 of Investment Advisors Act of 1940); *Touche Ross*, 442 U.S. at 568-79 (no implied damages action under Section 17(a) of the Securities Exchange Act of 1934).

[4] *See, e.g., In re Washington Public Power Supply System Securities Litigation*, 823 F.2d at 1356-57 (no implied cause of action under Section 17(a) of Securities Act of 1933); *Chairez v. INS*, 790 F.2d 544, 548 (6th Cir. 1986) (no implied damages action under Section 287 of Immigration & Naturalization Act of 1952); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97-98 (2d Cir. 1986) (no implied right under provisions of Federal Aviation Act of 1958); *Smith v. Russellville Production Credit Ass'n*, 777 F.2d 1544, 1548 (11th Cir. 1985) (no implied right under Farm Credit Act of 1971); *Canfield v. Sullivan*, 774 F.2d 1466, 1470 (9th Cir. 1985) (no implied right under Intergovernmental Personnel Act of 1970); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209-10 (D.C. Cir. 1985) (no implied right under War Powers Act of 1973); *Stewart v. Bernstein*, 769 F.2d 1088, 1092-93 (5th Cir. 1985) (no implied right for involuntary removal from nursing home under Medicaid Act of 1965); *Rapid Transit Advocates, Inc. v. Southern California Rapid Transit Dist.*, 752 F.2d 373, 377 (9th Cir. 1985) (no implied right under provisions of Urban Mass Transportation Act of 1964); *Bassler v. Central Nat'l Bank*, 715 F.2d 308, 313 (7th Cir. 1983) (no implied right under Sections 7(d), 27, or 29(b) of Securities Exchange Act of 1934); *Brown v. Virginia Opera Ass'n*, 698 F.2d 685 (4th Cir. 1983) (no implied right under Section 5(i) of the National Foundation on the Arts & Humanities Act of 1965).

[5] *See, e.g., Massachusetts Mutual*, 473 U.S. at 145, 147 (applying *Cort* and 1979 decision in *Transamerica* to statute enacted in 1974); *Middlesex County*, 453 U.S. at 13-15 (applying *Transamerica* to statute enacted in 1972); *Northwest Airlines*, 451 U.S. at 91-92, 94 & n.31 (applying *Transamerica*, *Cort* and 1979 decision in *Touche Ross* to statutes passed in 1963 and 1964); *Universities Research Ass'n*, 450 U.S. at 770-73 (applying *Touche Ross* and *Transamerica* to statute enacted in 1931).

must be read to create a private cause of action except in those rare instances where Congress explicitly specified a contrary intent. This Court should grant certiorari to clarify the effect of laws enacted during this period and resolve the split between the federal appeals courts concerning the proper application of the contemporary legal context test.

B. The Opinion Below Squarely Conflicts With This Court's Decisions In *Transamerica* And *Touche Ross*.

The ultimate issue in resolving whether a statute creates a private damages action is whether Congress evidenced an intent to create such a right.[6] In *Transamerica Mortgage Advisors, Inc. v. Lewis* and *Touche Ross & Co. v. Redington*, this Court established three principles for discerning when Congress has displayed the requisite intent:

- An implied damages action generally should not be found where the legislative history is silent on the issue. "[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross*, 442 U.S. at 571.[7]

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[6] *See Massachusetts Mutual*, 473 U.S. at 145 (" 'unless this Congressional intent can be inferred, . . . the essential predicate for implication of a private remedy simply does not exist' " (quoting *Northwest Airlines*, 451 U.S. at 94)); *Middlesex County*, 453 U.S. at 13 ("The key to the inquiry is the intent of the Legislature."); *California v. Sierra Club*, 451 U.S. 287, 293 (1981) ("Cases subsequent to *Cort* have explained that the ultimate issue is whether Congress intended to create a private right of action . . . ."); *Northwest Airlines*, 451 U.S. at 91 ("The ultimate question in cases such as this is whether Congress intended to create the private remedy . . . that the plaintiff seeks to invoke.").

[7] In subsequent decisions, this Court has described silence as creating an "inference" that Congress did not intend to create private actions and refused to find implied rights "[i]n the absence of strong indicia of a contrary congressional intent." *Kissinger*, 445 U.S. at 148-49; *Middlesex County*, 453 U.S. at 15.

- Creation of an implied cause of action is especially inappropriate where Congress expressly provided for other remedies in other Sections of the same statute. *Transamerica*, 444 U.S. at 19; *Touche Ross*, 442 U.S. at 571-72. "[W]hen Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Touche Ross*, 442 U.S. at 572.[8]
- Courts should be "extremely reluctant" to imply a cause of action that would be "significantly broader than the remedy that Congress chose to provide." *Touche Ross*, 442 U.S. at 574.

The Sixth Circuit failed to consider or even cite *Transamerica* and *Touche Ross* and disregarded all three of these cardinal principles.

First, the Sixth Circuit ignored this Court's warnings against creating implied causes of action where the legislative history is silent. The court of appeals acknowledged that Section 13(e)(1)'s legislative history was silent on the question. (11a.) But it twice speculated that Congressional silence *supported* an implied damages action. (*See* 9a, 11a-12a.)

Second, the Sixth Circuit failed to recognize that the express remedy for improper proxy statements in Section 18(a) of the Securities Exchange Act precludes finding an implied remedy under Section 13(e)(1). Instead, the court wrongly assumed that Section 18(a) was not applicable to proxy statements filed under Section 13(e)(1).[9] This error is particularly egregious since

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[8] *See also Massachusetts Mutual*, 473 U.S. at 145; *Middlesex County*, 453 U.S. at 13; *Universities Research Ass'n*, 450 U.S. at 773; *Kissinger*, 445 U.S. at 148.

[9] (12a n.4.) In fact, the language of Section 18(a) plainly encompasses violations of Section 13(e)(1). Section 18(a) makes any person filing an "application, report, or document filed pursuant to this chapter [*i.e.*, 15 U.S.C. § 78] or any rule or regulation thereunder" liable "for damages" for any "false or misleading" state-

Section 18(a) was one of the express remedies *Touche Ross* relied on in refusing to find an implied damages action under Section 17(a) of the Securities Exchange Act. *Touche Ross*, 442 U.S. at 571-72.

Third, having failed to recognize that Section 18(a) was applicable to Section 13(e)(1) violations, the Sixth Circuit created an implied action potentially far broader than the express remedy Congress provided. Section 18(a) contains vital defenses limiting the scope of that provision. For example, a false statement does not give rise to Section 18(a) liability if the plaintiff did not buy or sell "in reliance" upon the false or misleading statement, if the price was not "affected by such a statement," or if the defendant "acted in good faith and had no knowledge" of the falsity of the statement. 15 U.S.C. § 78r(a)(1982). In contrast, the Sixth Circuit made no ruling on whether these or any defenses are available in defending against the implied remedy it created under Section 13(e)(1).

The court of appeals' apparent refusal to apply the controlling principles announced in *Transamerica* and *Touche Ross* stemmed from its mistaken impression that Section 13(e)(1) was "explicitly patterned" after Section 14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a)(1982). (10a, 11a.) Since this Court had already recognized a damages action pursuant to Section 14(a) when Congress enacted Section 13(e)(1), the Sixth Circuit assumed that Congress intended to sanction private actions under Section 13(e)(1). (11a (citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)).)

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ment contained therein. 15 U.S.C. § 78r(a) (1982). SEC Rules 14a-6(a) and (c) and 13e-3(d) require that a proxy statement issued in connection with a going-private merger and the accompanying Schedule 13E-3 be filed with the Securities and Exchange Commission for its review. *See Kalmanovitz v. G. Heileman Brewing Co.*, 595 F. Supp. 1385, 1394 (D. Del. 1984), *aff'd*, 769 F.2d 152 (3d Cir. 1985); 17 C.F.R. §§ 240.13e-3(d), 240.14a-6(a), (c) (1987).

—The fallacy in such reasoning is that Section 13(e)(1)'s regulation of going-private mergers was not patterned after Section 14(a), but rather after an entirely different provision: Section 15(c) of the Securities Exchange Act, 15 U.S.C. § 78o(c) (1982). Section 13(e)(1), like Section 15(c), grants the Securities and Exchange Commission rulemaking authority not only to bar acts or practices which are "fraudulent, deceptive, or manipulative," but to "prescribe means reasonably designed to prevent such acts and practices." In contrast, Section 14(a) contains neither of these provisions.

The legislative history of the "going-private" portions of the Williams Act confirms that Section 15(c), and not Section 14(a), was the model for Section 13(e)(1). Senator Williams himself described Section 15(c) as the source for Section 13(e)(1):

> The revised standard is based on comparable language in section 15(c)(2) of the [Securities Exchange] Act, and should give the Commission adequate power to prescribe comprehensive rules and regulations to deal with the abuses arising in this area, just as its powers under section 15(c)(2) have enabled it to do [so] with respect to the activities specified in that section.

114 Cong. Rec. 21,954 (1968) (remarks of Sen. Williams). Nothing in the legislative history suggests a different source.[10]

Having failed to recognize Section 13(e)(1)'s roots in Section 15(c), the *Howing* panel failed to consider the overwhelming case law refusing to imply a private

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[10] The Sixth Circuit relied on an earlier comment by Senator Williams to conclude that Section 13(e)(1) was based on Section 14(a). (10a (citing 113 Cong. Rec. 24,665 (1967)).) But that comment concerned the *tender offer* provisions of the Williams Act ultimately codified in Section 14(e) of the Securities Exchange Act—not the going-private provisions now codified in Section 13(e)(1).

damages action under the latter provision. The Eighth and Ninth Circuits have squarely rejected damages actions under Section 15(c), as have district courts in seven districts.[11] Thus the Sixth Circuit's reliance on antecedents to Section 13(e)(1) provides no support for its departure from this Court's precedents restricting implication of private damages actions in the context of Congressional silence.

Other federal courts of appeals have read *Transamerica* and *Touche Ross* as severely limiting their authority to create damages actions. The Third Circuit, for example, concluded that one would have to be "blind" to developments in the law not to read *Transamerica* and

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[11] *See Brannan v. Eisenstein*, 804 F.2d 1041, 1043 n.1 (8th Cir. 1986); *Western Federal Corp. v. Erickson*, 739 F.2d 1439, 1443 n.5 (9th Cir. 1984) ("[T]here is no implied private cause of action for violations of § 15."); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1314 n.16 (9th Cir. 1982) ("the terms of the section and its legislative history indicate that Congress did not intend that . . . liability be implied" under Section 15); *Roberts v. Smith Barney, Harris Upham & Co.*, 653 F. Supp. 406, 414 (D. Mass. 1986); *Baum v. Phillips, Appel & Walden, Inc.*, 648 F. Supp. 1518, 1529 (S.D.N.Y. 1986); *Bull v. American Bank & Trust Co.*, 641 F. Supp. 62, 65 (E.D. Pa. 1986) ("[T]here is no implied private right of action under § 15 of the Exchange Act."); *Shotto v. Laub*, 632 F. Supp. 516, 518 n.2 (D. Md. 1986); *Olsen v. Paine Webber, Jackson & Curtis, Inc.*, 623 F. Supp. 17, 18 (M.D. Fla. 1985); *Corbey v. Grace*, 605 F. Supp. 247, 250-51 (D. Minn. 1985); *Berk v. Oppenheimer & Co.*, 1983-84 Fed. Sec. L. Rep. (CCH) ¶ 99,603, at 97,371 (N.D. Ill. 1983) ("[T]he implication of a private right of action under Section 15(c) would run counter to standards enunciated by the Supreme Court."); *Chapman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1983-84 Fed. Sec. L. Rep. (CCH) ¶ 99,419, at 96,409 (D. Md. 1983); *Pierson v. Dean, Witter, Reynolds, Inc.*, 551 F. Supp. 497, 502-04 (C.D. Ill. 1982); *Walck v. American Stock Exchange, Inc.*, 565 F. Supp. 1051, 1059 (E.D. Pa. 1981) ("Neither the express language nor the legislative history of § 15 provides a basis for concluding that Congress intended to create a right of action for money damages."), *aff'd*, 687 F.2d 778 (3d Cir. 1982), *cert. denied*, 461 U.S. 942 (1983).

Touche Ross as precluding a presumption "that statutory silence indicated congressional intent to create a cause of action by implication." *United States v. City of Philadelphia*, 644 F.2d 187, 192 (3d Cir. 1980).[12] But the Sixth Circuit did not consider *Transamerica* or *Touche Ross* at all. It thus failed to apply this Court's directive that where neither a statute nor its legislative history establishes an intent to sanction a damages action, courts may not create one. *Touche Ross*, 442 U.S. at 575.[13]

This Court should grant the petition to resolve the conflict between *Howing* on the one hand and *Touche Ross* and *Transamerica* on the other.

C. This Court's Guidance Is Needed To Resolve The Split Among Federal Courts Concerning The Availability Of Implied Damages Actions Under Section 13(e)(1).

As the Sixth Circuit itself acknowledged, its decision to recognize an implied damages action under Section 13(e)(1) is directly in conflict with prior federal authority on that precise issue.[14] Unlike the panel decision in this case, the two federal decisions rejecting an implied cause of action under Section 13(e)(1) carefully applied this Court's decisions in *Transamerica* and

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[12] *See also Hondo Nat'l Bank v. Gill Savings Ass'n*, 696 F.2d 1095, 1098 (5th Cir. 1983); *Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth.*, 667 F.2d 1327, 1334 (11th Cir. 1982).

[13] *See also Massachusetts Mutual*, 473 U.S. at 148 ("Because 'neither the statute nor the legislative history reveals a congressional intent to create a private right of action . . . we need not carry the . . . inquiry further.'") (citation omitted); *Northwest Airlines*, 451 U.S. at 94 n.31; *Universities Research Ass'n*, 450 U.S. at 770 n.21.

[14] (8a n.3, 12a n.4.) Although the *Howing* panel noted one contrary decision, it failed to note a second: *Berg v. First American Bankshares, Inc.*, 1984-85 Fed. Sec. L. Rep. (CCH) ¶ 92,011, at 91,012-13 (D.D.C. 1985), *aff'd*, 796 F.2d 489 (D.C. Cir. 1986).

Touche Ross and viewed Section 13(e)(1)'s silent legislative history as barring, not favoring, judicial creation of a private damages action.

First, the Sixth Circuit decision is directly contrary to *Kalmanovitz v. G. Heileman Brewing Co.*, which held "that no private right of action for money damages exists under Section 13(e)." 595 F. Supp. 1385, 1395 (D. Del. 1984), *aff'd*, 769 F.2d 152 (3d Cir. 1985). This Court's decisions in *Transamerica* and *Touche Ross* were critical to that holding:

> [The] United States Supreme Court has clearly stated that a private right of action for money damages will *not* be judicially implied unless there is a clear mandate from Congress concerning the relevant statute which either creates or alters civil liabilities in addition to a legislative history which contains some expression of Congressional intent to imply a private remedy. If the language of the statute and legislative history is silent, particularly if the statute contains other sections which include express provisions for enforcement and remedies, no right of action for money damages will be implied.

595 F. Supp. at 1394-95 (emphasis in original) (citing *Transamerica* and *Touche Ross*). Applying those decisions, *Kalmanovitz* found that no private right could be created "[b]ecause the legislative history" of Section 13(e) "is silent on the issue." *Id.* at 1395.

Second, the Sixth Circuit decision is directly contrary to *Berg v. First American Bankshares, Inc.*, which "hold[s] that under section 13(e) of the Securities Exchange Act, a private cause of action is not implied." 1984-85 Fed. Sec. L. Rep. (CCH) ¶ 92,011, at 91,013 (D.D.C. 1985), *aff'd*, 796 F.2d 489 (D.C. Cir. 1986). *Berg* also relied on the standard announced in *Transamerica* and *Touche Ross:*

> [N]o private damages remedy should be implied if the language of the statute and legislative history

> are silent, particularly if the statute contains other sections which include provisions for enforcement and remedies.

1984-85 Fed. Sec. L. Rep. at 91,012-13 (citing *Transamerica* and *Touche Ross*). Applying that standard, *Berg* emphasized two factors in rejecting an implied right: the silence of Section 13(e)'s legislative history; and the fact that "Section 18 of the Securities Exchange Act provides an explicit remedy for Section 13 violations." *Id.* at 91,013.[15]

Although this division of authority does not present a split between two appellate courts,[16] this Court's attention and guidance are needed to resolve these conflicting views. Put simply, no other appellate court is likely to be given the opportunity to consider the issue. Because Section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa (1982), creates jurisdiction in any district where proxies are mailed, and because publicly-held corporations typically have stockholders throughout the federal circuits, plaintiffs wishing to pursue Section 13(e)(1) claims likely need never test the issue in any district outside of the Sixth Circuit. The conflict has been squarely joined and this Court is unlikely to gain the views of other federal circuits by declining the petition.

Moreover, the need for this Court's timely resolution of this split is suggested by a second consideration: the

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[15] One other decision holds that Section 13(e)(1) does contain an implied damages action. *See Fisher v. Plessey Co.*, 1982-83 Fed. Sec. L. Rep. (CCH) ¶ 99,246 (S.D.N.Y. 1983).

[16] While Supreme Court Rule 17.1(a) refers to conflicts between two circuit opinions as illustrative of the "character of reasons that will be considered" in reviewing a petition for certiorari, this Court has noted divisions of authority comparable to that presented here in granting petitions. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 n.14 (1981) (noting division of four district court decisions); *Curtis v. Loether*, 415 U.S. 189, 191 n.2 (1974) (noting evenly divided district court decisions); *United States v. Constantine*, 296 U.S. 287, 290 (1935) (noting conflict of circuit and district courts).

enormous significance of going-private mergers to the public at large. For example, one market study reported that going-private transactions involved payment of $20.2 billion in 1986.[17] The Securities and Exchange Commission reported the filing of sixty-two proxies proposing going-private mergers in 1986 and anticipated a 26 percent increase during 1987.[18] Going-private transactions now account for nearly 20 percent of all takeover transactions.[19] It is thus imperative that this Court announce a uniform national rule for treatment of such transactions under the securities laws.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Dated: December 22, 1987

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[17] W.T. Grimm & Co., *Mergerstat Review* 86 (1987). In fact, the Grimm study underestimates the number of going-private transactions by excluding transactions valued at less than $1 million and mergers where the acquirer is an operating company.

[18] SEC Budget Estimate for Fiscal Year 1988 (detailing actual filings in 1986 and projecting 1987 filings).

[19] W.T. Grimm, *supra*, note 17.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-3929

HOWING CO., *et al.*,
Plaintiffs-Appellants,

v.

NATIONWIDE CORPORATION, *et al.*,
Defendants-Appellees.

Argued Oct. 2, 1986

Decided Aug. 7, 1987

William R. Jacobs argued, Strauss, Troy & Ruehlmann Co., L.P.A., Cincinnati, Ohio, for plaintiffs-appellants.

Jeffrey S. Davidson argued, Washington, D.C., for defendants-appellees.

Before MERRITT, GUY and NORRIS, Circuit Judges.

MERRITT, Circuit Judge.

Under § 13(e) of the Securities Exchange Act of 1934, a Williams Act provision enacted in 1968, a company that has issued publicly traded stock is prohibited from buying it back unless the issuer complies with rules

promulgated by the SEC.[1] This appeal raises issues concerning the existence of a private right of action under § 13e-3, the nature of the disclosure duty imposed by Rule 13e-3,[2] and the interrelationship of this provision with other antifraud rules.

Pursuant to its authority under § 13e-3, the SEC has issued Rule 13e-3 and Schedule 13e-3, a long and detailed set of disclosure requirements governing such "going private" transactions. Schedule 13e-3 accompanying the Rule requires that numerous items of information about the transaction be filed with the Commission, including three items pertinent to this case, i.e., Items 7, 8 and 9. Item 7 covers the "reasons" for the transaction; Item 8 requires a statement concerning the fairness of the transaction; and Item 9 requires disclosure of appraisals and other information concerning the value of the stock. The Rule also provides that this same information be disclosed to the selling shareholders.

The basic questions presented in this case are: (1) whether the plaintiffs have a private right of action under § 13e-3 to police non-compliance with Rule 13e-3; (2) and if so, whether the disclosure requirements of Rule 13e-3 have been met; and (3) if those requirements have not been met, whether defendant's conduct in vio-

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[1] *See* 15 U.S.C. § 78m(e)(1) (1982) which authorizes the Securities and Exchange Commission in the going private context, to adopt rules and regulations "(A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices." This section provides further that "[s]uch rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purpose, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors . . . ."

[2] 17 C.F.R. § 240.13e-3.

lating Rule 13e-3 also gives rise to liability under the antifraud provisions of Rules 10b-5 and 14a-9.

Parties and Summary of Disposition Below

Defendant Nationwide Corporation is one of the largest life insurance holding companies in the United States. Originally incorporated in 1947 as Service Insurance Agency, the company has enjoyed steady growth since its affiliation with the Nationwide group of insurance companies in September 1955. As a result of this affiliation, the company adopted its present name and issued a special class of common stock (Class B common) which was held entirely by two Nationwide companies: Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company. The Class A common stock continued in the hands of individual shareholders.

Because of the way voting rights were allocated between the Class A and Class B stock, complete ownership of the Class B shares gave Nationwide Mutual and Nationwide Mutual Fire effective control of the corporation. The Class B shares were entitled as a class to one-half of the voting power of the corporation as long as the percentage of Class B shares outstanding relative to outstanding shares of all classes combined did not fall below forty percent. Since it appears that the amount of outstanding Class B common was at all times sufficient to meet this threshold, Nationwide Mutual and Nationwide Mutual Fire held the same voting power as all the Class A shares combined. Under these circumstances, it is clear that these companies controlled the corporation despite wide public ownership of the Class A shares.

Nationwide Mutual and Nationwide Mutual Fire began to eliminate public ownership of Nationwide Corporation in December 1978 when these companies made a tender offer to buy the Class A shares for $20.00 per share net in cash. By January 1979, Nationwide Mutual

and Nationwide Mutual Fire had purchased 4,074,695 Class A shares through this offer. After the tender offer, Nationwide Mutual and Nationwide Mutual Fire continued to purchase shares in the open market at prices ranging between $22.50 and $24.62 per share. These transactions ultimately gave Nationwide Mutual and Nationwide Mutual Fire ownership of 85.6% of the Class A common stock formerly held by the public.

In November 1982, the Board of Directors of Nationwide Corporation approved a transaction in which Nationwide Mutual and Nationwide Mutual Fire would acquire the remaining Class A shares at $42.50 per share. As a result, Nationwide Corporation would become a wholly-owned subsidiary of the two mutuals, and would have no public ownership. This transaction was approved by 94.7% of the Class A shares. Plaintiffs in the present litigation abstained from voting their shares respecting the merger or seeking their appraisal remedy under state law.

The present class action began with an action by Belle Efros, a Nationwide shareholder, seeking a preliminary injunction with respect to a vote on the proposed merger. Following the denial of the Efros motion for a preliminary injunction, the merger was approved by 94.7% of the voted public shares. The District Court ultimately consolidated the Efros action with an action brought by the Howing Company and Douglas McClellan, two former shareholders of Nationwide. The District Court also later conditionally certified the case as a class action. The final amended complaint in this action raised claims under the Securities Exchange Act of 1934 §§ 10(b), 13(e), and 14(a) and rules promulgated thereunder as well as state law claims based on a breach of fiduciary duty.

The defendants moved for summary judgment and plaintiffs filed a cross-motion for partial summary judg-

ment. The District Court granted defendants' motion, denied plaintiffs' cross-motion, and dismissed the amended complaint, 625 F.Supp. 146 (D.Ohio 1985).

The District Court identified compliance with Rule 13e-3 as the principal issue in the case. The District Court framed its scope of review as follows:

> We therefore will review the proxy material of Nationwide Corporation to see if it meets the standards of disclosure required by Rule 13e-3. If in any instance there has been a failure to meet the standard, we will then examine whether such failure constitutes a material breach, and if we conclude that there is a jury question concerning the materiality of the breach, then, of course, there would be a genuine issue of fact to be determined.

625 F.Supp. at 151.

In reviewing the proxy statement's compliance with Rule 13e-3, the District Court begins with Item 7 of the Rule which essentially covers the "reasons" for the transaction. The District Court concluded that the proxy statement adequately disclosed the purposes of the transaction as well as its benefits and detriments. The District Court stated that "[w]e decline to second guess the directors of Nationwide as to the stated purpose for the merger," 625 F.Supp. at 152, and stated further that "[w]e conclude that the detriments and benefits were adequately discussed in the proxy statement and that the gravamen of plaintiffs' argument on this issue is actually that the merger price itself was not fair to the public stockholders." *Id.* at 153.

With respect to the proxy statement's compliance with the Item 8 fairness disclosure, the District Court considered three contentions by plaintiffs: (1) the proxy statement did not sufficiently discuss the net book value, liquidation value, and going concern values of Nationwide

shares; (2) the proxy statement did not explicitly state that Nationwide stock was "thinly traded"; and (3) the proxy statement did not sufficiently discuss the basis for the First Boston opinion letter.

On the question of valuation, the District Court noted that "the proxy statement contained extensive financial information necessary to compute the net book, liquidation, and going concern values of Nationwide shares." 625 F.Supp. at 155. The District Court found that the proxy statement met the requirements of Rule 13e-3 in this regard:

> Rule 13e-3 "merely requires that an opinion be given and the material factors on which it is based be disclosed." We conclude that defendants satisfied this requirement of Rule 13e-3 by listing the factors considered by the Evaluation Committee and by candidly stating that no specific weight was given to any one factor, but of particular importance in the consideration was First Boston's opinion and the fact that the merger price represented a premium over the market price of the stock.

Id.

With respect to the "thinly traded" nature of the stock, the District Court found that sufficient information was disclosed "to allow a reasonably prudent shareholder to make his own characterization of the market for the Nationwide stock." *Id.* at 156. Specifically, the District Court noted that the proxy statement disclosed that "Nationwide Mutual owned 85.6% of the outstanding Class A shares, the number of publicly held shares, and that the stock was traded only in the 'over-the-counter market.'" *Id.* at 155-56.

Concerning the proxy statement's discussion of the First Boston opinions, the District Court addresses plaintiffs' contention that the proxy statement failed to set forth projected growth rates and increase of earnings.

Relying on this Court's reasoning in *Starkman v. Marathon*, 772 F.2d 231 (6th Cir. 1985), the District Court considered the omitted information to be "soft" information since "earnings and cash flow projections do not rise to the level of substantial certainty triggering a duty to disclose." 625 F.Supp. at 156 (citing *Starkman*, 772 F.2d at 242). Accordingly, the District Court concluded that defendants were not required to disclose projected growth rates and future increase of earnings.

The District Court also dismissed plaintiffs' argument that the First Boston opinion "should have disclosed information regarding comparable life insurance companies as such information would reveal the unfairness of the cash out price." 625 F.Supp. at 157. The District Court rejected plaintiffs' argument on the following grounds: "There is no indication that there was anyone or any other entity, besides Mutual, interested in purchasing Nationwide. Therefore, the alleged omission of 'comparable values' was immaterial and indeed such information may have been misleading if discussed." *Id.*

The District Court concluded overall that the proxy statement satisfied the requirements of Rule 13e-3. The District Court stated:

> Most important, there was sufficient information disclosed in the proxy statement to enable the stockholders to make an informed decision on what to do. It is the conclusion of the Court, therefore, that there is no genuine issue of material fact concerning the adequacy of the proxy statement when measured against the standards set forth in Rule 13e-3, and that any omissions pointed out by plaintiffs were not material as defined by the Court in *TSC Industries, Inc.* [*Northway Inc.*], 426 U.S. [438] at 449, 96 S.Ct. [2126] at 2132 [48 L.Ed.2d 757 (1976)].

Id.

Finally, the District Court considered and rejected plaintiffs' state law claims. The District Court stated

that "since there is no evidence of any breach of fiduciary duty owed plaintiffs by defendants, and the merger was neither unauthorized by statute, illegal nor ultra vires under Ohio corporation law, the Ohio statutory appraisal right constituted plaintiffs' exclusive state law remedy." *Id.* The District Court noted that plaintiffs failed to resort to the appraisal remedy.

Private Right of Action Under § 13(e)

In the present case, we must decide a question of first impression in the federal courts of appeals: Does § 13(e) of the Securities and Exchange Act of 1934 allow a private right of action for damages? The District Court assumed that a private right of action exists, and we agree. Based upon our review of the statute, the legislative history, and the Supreme Court's decisions respecting private rights of action, we conclude that such a right of action does exist under § 13(e).[3]

The law relating to judicially-implied private rights of action under federal statutes has undergone a process of evolution over the past seventy years. When federal lawmaking was a less detailed and comprehensive endeavor, a private remedy was ordinarily presumed in favor of the class for whose benefit the statute was enacted. *See Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 374-75, 102 S.Ct. 1825, 1837-38, 72 L.Ed.2d 182 (1982) (citing *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874 (1916)). As the complexity of federal legislation and volume of litigation

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[3] Two District Courts have split on the existence of a private right of action under § 13(e). *See Fisher v. Plessey Co.*, [1982-83 transfer binder] Fed.Sec.L.Rep. (CCH) ¶ 99,246 (S.D.N.Y. June 22, 1983) [Available on WESTLAW, DCT database] (implying private action). *But see Kalmanovitz v. G. Heileman Brewing Co.*, 595 F.Supp. 1385 (D.Del. 1984) (denying right of action), *aff'd on other grounds*, 769 F.2d 152 (3d Cir. 1985). For a discussion of the error in the *Kalmanovitz* reasoning, see note 4 *infra*.

increased, the liberal *Rigsby* rule became unworkable. A unanimous Supreme Court responded by modifying the law on implied private rights of action. The result, announced in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), was a four-part test that focused primarily on congressional intent. Under *Cort*, a private right of action exists where: (1) the plaintiff is a member of the class for whose especial benefit the statute was enacted; (2) there is any indication, explicit or implicit, of legislative intent to support such a remedy; (3) an implied private right of action is consistent with the purposes of the legislative scheme; and (4) the cause of action is not "one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law." *Id.* at 78, 95 S.Ct. at 2088 (citations omitted).

This decision and those following it, such as *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), were intended to suggest that Congress be more explicit about private remedies in future legislation. However, because the rule announced by *Cort* was such a departure from existing law, there has been some reluctance to apply it to legislation enacted prior to that decision. According to *Cannon*, Congress is entitled to rely on the "contemporary legal context" in which it acts, 441 U.S. at 698-99, S.Ct. at 1958. When Congress passed legislation prior to *Cort*, that context would presume a private remedy if the statute and its history were otherwise silent. *See Curran*, 456 U.S. at 374-75, 382 n.66, 102 S.Ct. at 1837-38, 1841 n.66.

The decision in *Cannon v. University of Chicago* is particularly instructive. In that case, the Supreme Court held that Congress indicated its intent to allow a private right of action to enforce Title IX of the Education Amendments of 1972 when it patterned that law on another statute—Title VI of the Civil Rights Act of 1964—

which had been interpreted to support private suits. Although the *Cort* test was still applied, this adoption theory satisfied the crucial legislative intent test contained in the second *Cort* factor. Given a contemporary legal context in which Title VI had been construed to support a private cause of action, Congress' choice to pattern Title IX after that previous statute made it "not only appropriate but also realistic to presume that Congress was familiar with these unusually important precedents . . . and that it expected its enactment to be interpreted in conformity with them." *Cannon*, 441 U.S. at 699, 99 S.Ct. at 1958.

In order to determine the existence of a private right of action under § 13(e), therefore, we must apply the criteria established by *Cort v. Ash* with consideration for the "contemporary legal context" in which the legislation was passed. Such an undertaking requires that we understand the history and the structure of the statute in question.

Section 13(e)(1) of the Securities Exchange Act was not part of the original statute but was added by the Williams Act in 1968. The stated purpose of the Williams Act was to protect investors from potential manipulation of tender offers and corporate repurchases of stock. *See Piper v. Chris-Craft Indus.*, 430 U.S. 1, 26-35, 97 S.Ct. 926, 941-46, 51 L.Ed.2d 124 (1977). The legislation was explicitly patterned after the statutes and regulations then governing proxy solicitations. *See* 113 *Cong. Rec.* 24,665 (1967) (statement of Senator Williams). As a result, the language of § 13(e) and other Williams Act provisions parallel that used in § 14(a) of the Securities Exchange Act of 1934.

From this legislative history, it is clear that the first three *Cort* factors are satisfied with respect to § 13(e). The first *Cort* factor applies the old *Rigsby* test and asks if the plaintiff is one for whose especial benefit the statute was enacted. Since the Supreme Court established in

Piper that the Williams Act was intended "for the protection of investors," 430 U.S. at 35, 97 S.Ct. at 946, it cannot be gainsaid that the investors such as the current plaintiffs fall within the benefitted class. Thus, the first *Cort* factor is met.

The second *Cort* factor—whether there is evidence of a legislative intent to allow or deny a private remedy—favors a private cause of action for two distinct reasons. First, since the Williams Act was explicitly patterned on the proxy rules, the analysis employed by the Supreme Court in *Cannon v. University of Chicago* applies here. When § 13(e) was adopted in 1967, the Supreme Court had already recognized an implied private right of action under § 14(a) in *J.I. Case v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). In support of the private action upheld in *Borak*, Justice Clark, speaking for the Court, placed special emphasis on the power granted to the SEC "to protect investors." *Id.* at 432, 84 S.Ct. at 1559. Under the rationale of *Cannon*, therefore, Congress indicated its desire to allow a private right of action under § 13(e) when it chose language that was identical to the crucial language supporting a private right of action under § 14(a). *See also Lorillard v. Pons*, 434 U.S. 575, 580-81, 98 S.Ct. 866, 870, 55 L.Ed.2d 40 (1978) (Congress presumed to incorporate interpretations of prior law when it incorporates text into new law).

Aside from Congress' choice of § 14(a) as a model, there is a second aspect of the "contemporary legal context" which supports a private right of action for § 13(e). At the time the Williams Act was passed, implied rights of action were in a heyday of sorts. *See Cannon*, 441 U.S. at 718, 99 S.Ct. at 1968 (Rehnquist, J., concurring); *Leist v. Simplot*, 638 F.2d 283, 316-17 (2d Cir.1980). Congress could have justifiably presumed that its silence with regard to private actions would be interpreted to indicate authorization. Silence, in the contemporary legal context of the Williams Act, did not constitute disapproval

of an implied private action. Since there is no evidence of legislative intent to deny a private remedy, Congress' choice to incorporate the proxy rules without additional comment is an indication of legislative intent sufficient to satisfy the second *Cort* test. *See Cannon*, 441 U.S. at 698-99, 99 S.Ct. at 1958-59; *Cort*, 422 U.S. at 82, 95 S.Ct. at 2089.

The third element of the *Cort* test—where an implied private action is consistent with the legislative scheme—is also satisfied by § 13(e). Although the statute is designed for the protection of investors, no mechanism is provided by which these investors can vindicate their interests.[4] As noted by Justice Clark in *Borak* with respect to the proxy rules, private enforcement may be the *only* way to achieve the purposes of § 13(e) given limited resources under the SEC's command. *Borak*, 377 U.S. at 433, 84 S.Ct at 1560. Under these circumstances, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective . . . congressional purpose." *Id.* Since a private right of action would fill a void in enforcement, it is entirely consistent with the legislative scheme established by § 13(e).

The fourth *Cort* factor concerns whether the cause of action is one traditionally relegated to state law. Since 1933, the obligations of an issuer to the public and its stockholders have been a matter of federal law. The specific disclosure duty at issue here is a federal law. In light of the inherently federal nature of this claim, it is clear that a private right of action would not interfere

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[4] Section 18 of the Securities Exchange Act, 15 U.S.C. § 78r, provides an express remedy for some subsections of § 13, but not subsection (e). This remedy was provided prior to the Williams Act for misstatements in filings with the Commission. It does not apply where inadequate disclosure is made to shareholders. The critical error committed by the District Court in *Kalmanovitz v. G. Heileman Brewing Co.*, 595 F.Supp. 1385, 1393-95, is the assumption that the § 18 remedy affords relief for aggrieved shareholders.

with the regulatory prerogatives of the various states. It is also clear that the plaintiffs in this case meet the requirements set forth by *Cort v. Ash* and its progeny, and are therefore entitled to maintain a private action against Nationwide for violations of § 13(e).

Rule 13e-3 Compliance

Going private transactions raise unique problems because of their inherently coercive nature: minority shareholders are forced to exchange their shares for cash or other consideration. The coercive effect of these transactions is reinforced by the fact that the majority shareholders control the timing and terms of the transaction.

In promulgating Rule 13e-3 pursuant to § 13(e), 17 C.F.R. § 240.13e-3, the SEC recognized the potential for overreaching in going private transactions:

> The nature of and methods utilized in effecting going private transactions present an opportunity for overreaching of unaffiliated security holders by an issuer or its affiliates. This is due, in part, to the lack of arms-length bargaining and the inability of unaffiliated security holders to influence corporate decisions to enter into such transactions. Additionally, such transactions have a coercive effect in that security holders confronted by a going private transaction are faced with the prospects of an illiquid market, termination of the protections under the federal securities laws and further efforts by the proponent to eliminate their equity interest.

Exchange Act Release No. 34-17719, *reprinted in* 3 Fed. Sec.L.Rep. (CCH) ¶ 23,709, at 17,245-28 (April 13, 1981).

This Court has also recognized the special problems posed by going private transactions and the need for greater disclosure. In *Radol v. Thomas*, 772 F.2d 244, 255

(6th Cir.1985), *cert. denied,* —— U.S. ——, 106 S.Ct. 3272, 91 L.Ed.2d 562 (1986), the Court stated:

> The more extensive legal disclosure requirements which apply to freeze-out merger proxy statements are therefore justified by the fact that the law has given the majority the power to foreclose the ownership rights of the minority and has thereby eliminated the market as a correcting mechanism, leaving minority shareholders with only the option of dissent and appraisal, an option which cannot rationally be exercised unless the majority is compelled to make full disclosure regarding appraisals, earnings projections and other information that sheds light on the value of the firm.

Rule 13e-3 serves as the primary and most direct vehicle under the federal securities laws for mandating this disclosure in going private transactions. Subsection (e) of Rule 13e-3 prescribes which information from the issuer's Schedule 13e-3 filing with the Commission shall be provided to shareholders as well as the form and content of this public disclosure. *See* 17 C.F.R. § 240.13e-3 (e). Subsection (e) mandates, for example, that where a going private transaction requires the use of a proxy statement, the Rule 13e-3 disclosure be presented in a "Special Factors" section of the proxy statement. 17 C.F.R. § 240.13e-3(e) (1), (3) (i).

Rule 13e-3 does not require that the issuer's Schedule 13e-3 filing with the Commission be reproduced in its entirety in the communication with shareholders. Most items from that Schedule may be summarized. However, Items 7, 8 and 9 must be disclosed verbatim. The rationale behind complete disclosure of these items is that they go to the essence of the transaction. Item 7 requires full disclosure of the purposes, alternatives, reasons, and effects of the transaction; Item 8 requires a statement as to the fairness of the transaction and the factors upon

which such belief is based; and Item 9 requires disclosure of reports, opinions, appraisals and certain negotiations.

A. *Item 7 Disclosure*

Item 7 of Schedule 13e-3 requires that the issuer (1) state the purpose for the transaction, (2) discuss any alternative means considered, (3) state the reasons for the structure of the transaction and for its timing, and (4) describe the effects of the transaction on the issuer, its affiliates and unaffiliated security holders. Instruction 2 to Item 7 contains the following guidance: "The description required by Item 7(d) should include a reasonably detailed discussion of the benefits and *detriments* of the Rule 13e-3 transaction to the issuer, its affiliates and unaffiliated security holders. The benefits and detriments of the Rule 13e-3 transaction should be quantified to the extent practicable." (emphasis added).

In the proxy statement, defendants enumerated four reasons for undertaking the transaction: first, eliminating potential conflict of interest problems; second, increasing management flexibility in the insurance and financial markets; third, simplifying the management structure of the Nationwide companies as a whole; and fourth, eliminating the substantial costs of servicing its public shareholders. The proxy statement indicates that the Company considered the possibility of a further tender offer, but rejected this option since the Company did not believe it compared favorably with the going private route in achieving the Company's overall objectives. The proxy statement indicates further that the Company proposed the transaction when it did in order to "maintain their competitive position in the industry." The proxy statement also states that the "[i]nitial out-of-pocket savings to Nationwide Corporation are estimated to be $300,000 per year."

The gravamen of plaintiffs' case on Item 7 compliance appears to be that the proxy statement failed to disclose

adequately the "detriment" to Nationwide Mutual of the transaction and thereby concealed the true purpose of the transaction. Plaintiffs argue that a "company does not sacrifice $3,000,000 of annual income in order to save $300,000 and to achieve other nonquantifiable benefits. Having determined that the stated benefits were not genuine, a shareholder would search for the true purpose of the transaction: to acquire the minority interest at a bargain price." Brief of Appellants at p. 37.

In reviewing defendants' Item 7 disclosure, we find as did the District Court that defendants have complied with this part of Rule 13e-3. Plaintiffs do not suggest specific reasons not enumerated by defendants for undertaking the transaction; their challenge on this point reduces to an attack on the substantive fairness of the transaction. Defendants have specified legitimate reasons for the transaction, and since plaintiffs bear the burden of proof on this issue, plaintiffs' Item 7 challenge must fail.

B. *Item 8 Disclosure*

The instructions accompanying Schedule 13e-3 are quite definite in the level of specificity required in certain disclosures.[5] The Instruction to Item 8 states that

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[5] The Instructions to Item 8(b) of the Schedule identify the following factors to be discussed in the disclosure:

> Instructions. (1) The factors which are important in determining the fairness of a transaction to unaffiliated security holders and the weight, if any, which should be given to them in a particular context will vary. Normally such factors will include, among others, those referred to in paragraphs (c), (d) and (e) of this Item and whether the consideration offered to unaffiliated security holders constitutes fair value in relation to:
>
> (i) Current market prices,
>
> (ii) Historical market prices,
>
> (iii) Net book value,
>
> (iv) Going concern value,
>
> (v) Liquidation value,

"[c]onclusory statements, such as 'The Rule 13e-3 transaction is fair to unaffiliated security holders in relation to net book value, going concern value and future prospects of the issuer' *will not be considered sufficient disclosure in response to Item 8(a).*" (emphasis added.)

The Commission has expressed special concern with disclosures under Item 8(b) of Schedule 13e-3, the Item concerning the factors underlying a belief as to the fairness of the transaction. The Commission has issued the following guidance to prospective issuers:

> The Division is concerned that in many instances the Item 8(b) disclosure being made to security holders is vague and non-specific and is therefore of limited utility to security holders. . . . Each such factor which is material to the transaction should be discussed and, in particular, if any of the sources of value indicate a value higher than the value of the consideration offered to unaffiliated security holders, the discussion should specifically address such difference and should include a statement of the bases for the belief as to fairness in light of the difference.

Exchange Act Release No. 34-17719, at 17, 245-42.

The most serious problem in defendants' proxy statement concerns Item 8(b) compliance. Our review of the proxy statement indicates that defendants have made precisely the kind of conclusory statements prohibited by the Rule. In describing the fairness of the transaction as required by Item 8(b), defendants have done

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(vi) The purchase price paid in previous purchases disclosed in Item 1(f) of Schedule 13e-3,

(vii) Any report, opinion, or appraisal described in Item 9 and

(viii) Firm offers of which the issuer or affiliate is aware made by any unaffiliated person, other than the person filing this statement, during the preceding eighteen months . . .

nothing more than provide a laundry list of factors considered by their investment banker.[6]

This kind of non-specific disclosure runs counter not only to the SEC's position taken in the Commission release discussed above but also to the Instruction to Item 8(b) of Schedule 13e-3. The Instruction states that the issuer shall "[d]iscuss in reasonable detail the material factors upon which the belief stated in Item 8(a) is based and, to the extent practicable, *the weight assigned to each factor.*" (emphasis added). Thus, the proxy statement is incomplete in that we are not provided with any indication of the weights given the various factors as required by Rule 13e-3, incorporating Schedule 13e-3. Moreover, we therefore have no indication as to whether any of the "sources of value indicate a value higher than the value of the consideration offered to unaffiliated security holders." Exchange Act Release No. 34-17719, at 17, 245-42.

Instead of providing this itemized disclosure called for by Rule 13e-3, defendants rely heavily on the First Boston opinion letter to discharge their disclosure obligations.[7] Indeed, the proxy materials state specifically, "Although the Evaluation Committee did not give specific weight to each of the various factors considered in evaluating the fairness of the proposed merger, particular emphasis was placed upon the receipt of the opinion of First Boston."

While the Commission has stated that an issuer in a going private transaction can rely on an investment banker's opinion to meet its disclosure obligations, such opinion itself must fully analyze the factors enumerated in Item 8(b) as well as be "expressly adopted" by the

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[6] See Appendix A for the relevant language from the proxy statement.

[7] See Appendix B for the language from the First Boston opinion letter which appears in the proxy statement as Exhibit II.

issuer. Exchange Act Release No. 34-17719, at 17, 245-42. The issuer in this case did not conduct its own investigation but chose to rely on the expertise of First Boston. The problem with defendants adopting the First Boston opinion letter as their disclosure to shareholders is that this one-page letter is itself woefully inadequate when measured against the specific disclosure requirements of the Rule. An issuer cannot insulate itself from 13e-3 liability by relying on an investment banker's opinion letter which itself does not comply with the specific disclosure requirements of the Rule. Therefore, defendants' conclusory statements are not cured by conclusory statements made by First Boston in its opinion letter.

Somewhere in the proxy materials the Nationwide shareholders should have received a reasonably detailed analysis of the various financial valuation methods discussed by the Rule and the weights attached thereto. Even if certain valuation methods were not particularly relevant, this should itself have been noted and explained. *See* Exchange Act Release No. 34-17719, at 17,245-42. Without this disclosure, Nationwide shareholders did not possess the information necessary to make an informed decision concerning the going private transaction.

C. *Item 9 Disclosure*

Item 9 requires disclosure of various factors relating to appraisals by an outside party. For example, the issuer must disclose the identity of the outside party; the qualification of the outside party; the method of selection of the outside party; the relationship between the outside party and the issuer over the past two years or any relationship which is contemplated, and any compensation received or to be received; whether the issuer or outside party recommended the amount of consideration to be paid; and a summary of the appraisal.

In the section of the proxy statement entitled "Opinion of the First Boston Corporation," defendants appear

to have covered all the elements required in Item 9 disclosure. The proxy statement, for example, reveals the following: First Boston had served as a financial advisor to the Nationwide companies on several matters in the recent past; First Boston recommended the cash-out price of $42.50; and Nationwide Mutual agreed to pay First Boston a fee of $175,000 in connection with the proposed merger as well as all reasonable out-of-pocket expenses, including counsel's fees. The proxy statement also reviewed the information reviewed and relied upon by First Boston.

Plaintiffs' main argument on Item 9 compliance centers on one factor considered by First Boston and cited in defendants' proxy statement—"present value of projected future cash flows of the Corporation." Plaintiffs contend that "[s]ince the actual projection of increased revenue and earnings was the most important single basis for First Boston's recommendation, disclosure was required."

Plaintiff reads more into Item 9 than is actually required: the challenge to Item 9 compliance seems to constitute an Item 8 claim if anything. As the above discussion indicates, Item 9 requires the disclosure of procedural matters. Accordingly, since defendants appear to have complied with this Item, we find no problem in Item 9 compliance.

D. *Rule 13e-3 Liability*

The basic problem with the disposition below is that the District Court did not engage in the detailed analysis required by Rule 13e-3, particularly with respect to Item 8(b) of Schedule 13e-3. The District Court's error in this regard may stem from its reliance on the following language from this Court's decision in *Starkman v. Marathon*, 772 F.2d 231, 240 (6th Cir.1985): "[w]e have rejected the position that SEC rules regarding

freezeout mergers and proxies should determine the disclosure obligations of target management in the first stage of a two-tier tender offer." *Starkman* is inapposite to the present case because this is not the first stage of a two-tier tender offer, but rather the second and final step in this process.

Subsection (b)(2) of Rule 13e-3 states that "it shall be unlawful for an issuer . . . to engage, directly or indirectly, in a Rule 13e-3 transaction unless [the] issuer" . . . complies with the filing, disclosure, and dissemination requirements of the Rule. As discussed above, defendants did not comply with the disclosure obligation imposed by the Rule—a failure declared unlawful by subsection (b)(2) of the Rule. Accordingly, since plaintiffs have a private right of action under § 13(e) to police such unlawful behavior, the District Court erred in its disposition of plaintiffs' Rule 13e-3 claims.

The Antifraud Claims

In addition to liability under subsection (b)(2) of Rule 13e-3, plaintiffs also contend that the defendants breached the antifraud provisions of Rules 10b-5,[8] 13e-

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[8] Securities Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5, reads as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud.
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

3(b)(1),[9] and 14a-9.[10] In essence, plaintiffs contend that a failure to disclose information required by Rule 13e-3 *ipso facto* constitutes an "omission" actionable under the antifraud provisions. They argue that Rules 10b-5 and 14a-9 incorporate Rule 13e-3 by reference in the going private context.

The three antifraud provisions at issue here spring from distinct statutes which have unique texts and histories. All three, however, parallel the common law of fraud and deceit. Absent special circumstances, an action for deceit would lie at common law for both falsehoods

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[9] Securities Exchange Act Rule 13e-3(b)(1), 17 C.F.R. § 240.13e-3(b)(1), is virtually identical to Rule 10b-5 and reads as follows:

> It shall be a fraudulent, deceptive or manipulative act or practice, in connection with a Rule 13e-3 transaction, for an issuer which has a class of equity securities registered pursuant to section 12 of the Act or which is a closed-end investment company registered under the Investment Company Act of 1940, or an affiliate of such issuer, directly or indirectly
>
> (i) To employ any device, scheme or artifice to defraud any person;
>
> (ii) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (iii) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

[10] Securities Exchange Act Rule 14a-9, 17 C.F.R. § 240.14a-9, reads as follows:

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a

and half-truths, but not for a complete failure to disclose. *See* III L. Loss, *Securities Regulation* at 1433-35. As was noted by this circuit almost fifty years ago with regard to a similarly worded antifraud provision in the Securities Act of 1933:

> The statute did not require appellant to state every fact about stock offered that a prospective purchaser might like to know or that might, if known, tend to influence his decision, but it did require appellant not "to obtain money or property by means of any untrue statement of a material fact *or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.*

Otis & Co. v. SEC, 106 F.2d 579, 582 (6th Cir. 1939) (emphasis in original) (construing § 17(a)(2) of the Securities Act of 1933).

The second clauses of Rules 10b-5 and 13e-3(b)(1), and similar language in Rule 14a-9, adopt the common law rule and prohibit silence only where the omitted information is necessary to prevent inaccuracy in existing disclosure. As a result, these provisions have been considered by commentators and the courts alike to be concerned with half-truth rather than omissions *per se*. *See Myzel v. Fields*, 386 F.2d 718, 733 n.6 (8th Cir. 1967); *Trussell v. United Underwriters, Ltd.*, 228 F. Supp. 757, 767 (D.Col. 1964); *Cochran v. Channing Corp.*, 211 F.Supp. 239, 243 (S.D.N.Y. 1962); *see also* III L. Loss, *Securities Regulation* at 1439; A. Bromberg & L. Lowenfels, *Securities Fraud & Commodities Fraud* § 2.6(2).

The essence of plaintiffs' claim is that a failure to provide items of disclosure required by Rule 13e-3(e) al-

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proxy for the same meeting or subject matter which has become false or misleading.

ways constitutes a material omission under the antifraud rules. This is tantamount to incorporating the disclosure provisions of the securities laws into the antifraud provisions. No longer would omissions be actionable only where a half-truth resulted. Instead, any failure to comply with SEC disclosure obligations would be actionable by private litigants under the antifraud provisions.

Although the antifraud rules are the "catch-all" provisions of the securities laws, the Supreme Court has emphasized in the Rule 10b-5 context that they apply only where some fraud has been committed. *See Chiarella v. United States*, 445 U.S. 222, 234-35, 100 S.Ct. 1108, 1117-18, 63 L.Ed.2d 348 (1980). Congress did not enact sections 10(b), 13(e), or 14(a) to give private litigants the same enforcement powers granted to the Commissioner of the SEC. Allowing private suits based on any non-disclosure, without regard to the "half-truth" limitation, would contravene the congressional intent behind these statutes. Therefore, we hold that omission of disclosure required by Rule 13e-3(e) will constitute a violation of the antifraud provisions of sections 10(b), 13(e), and 14(a) only where the information is necessary to prevent half-truth. The violations of Rule 13e-3, Item 8, itemized above, do not constitute "fraud" under sections 10(b) and 14(a) but should be considered as violations only of the specific rule in question.[11]

Remand Order

The case is remanded to the District Court with instructions to reconsider defendants' failure to provide Item 8 information in the violation of Rule 13e-3, as established by this opinion. The District Court should also consider issues of materiality of the defendants'

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[11] Under certain circumstances, violations of Rule 13e-3 may be indicative of a "scheme or artifice to defraud" which would violate the antifraud provisions. Such is not the case here, however, where non-disclosure is claimed to be a violation standing alone.

omission under Rule 13e-3. After reconsidering the federal claims under Rule 13e-3, the District Court should determine whether it is necessary to decide the alternative state claims respecting breach of fiduciary duty. If so, the District Court's disposition of the state claims should be accompanied by detailed findings of fact and conclusions of law concerning the state standard of fiduciary duty used by the Court.

Accordingly, the judgment of the District Court is reversed and remanded for proceedings consistent with this opinion.

GUY, Circuit Judge, concurring in part and dissenting in part.

Although I concur in most of Judge Merritt's well-written and thorough opinion, I disagree with the conclusions reached in Part B, Item 8, Disclosure. Since it is this part of the court's decision that results in this case being remanded, I must dissent.

I believe the district court properly analyzed plaintiffs' disclosure claims pursuant to Rule 13e-3, which sets forth disclosure requirements for going-private mergers, notwithstanding that the disclosure requirements under Rule 13e-3 are more detailed in a going-private transaction than in other types of mergers. *See Radol v. Thomas*, 772 F.2d 244, 254-55 (6th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 3272, 91 L.Ed.2d 562 (1986) (as quoted in the majority opinion). Along with Rule 13e-3, the regulations provide an itemized list of information which must be included in the proxy statement. In accord with this list, plaintiffs' claims relating to alleged inadequate disclosure can be separated into three components. First, plaintiffs claim that the proxy statement did not adequately disclose the "benefits and detriments" of the merger. Second, plaintiffs claim that

the proxy statement did not sufficiently explain why the merger occurred at the time that it did. Finally, plaintiffs contend that the proxy statement did not discuss the fairness of the transaction in sufficient detail. As I read the majority opinion, it is only that part of the district court's decision dealing with the fairness of the transaction with which they find fault.

Item 8 of Schedule 13e-3, 17 C.F.R. § 240.13e-100, requires:

> Item 8. *Fairness of the Transaction.* (a) State whether the issue or affiliate filing this schedule reasonably believes that the Rule 13e-3 transaction is fair or unfair to unaffiliated security holders.
>
> . . . .
>
> (b) Discuss in reasonable detail the material factors upon which the belief stated in Item 8(a) is based and, to the extent practicable, the weight assigned to each such factor. Such discussion should include an analysis of the extent, if any, to which such belief is based on the factors set forth in instruction (1) to paragraph (b) of this Item, paragraphs (c), (d), and (e) of this Item, and Item 9.
>
> *Instructions.* (1) The factors, which are important in determining the fairness of a transaction to unaffiliated security holders and the weight, if any, which should be given to them in a particular context will vary. Normally such factors will include, among others, those referred to in paragraphs (c), (d), and (e) of this Item and whether the consideration offered to unaffiliated security holders constitutes fair value in relation to:
>
> (i) Current market prices,
>
> (ii) Historical market prices,
>
> (iii) Net book value,
>
> (iv) Going concern value,

(v) Liquidation value,

(vi) The purchase price paid in previous purchases disclosed in Item 1(f) of Schedule 13e-3,

(vii) Any report, opinion, or appraisal described in Item 9 and

. . . .

(c) State whether the transaction is structured so that approval of at least a majority of unaffiliated security holders is required.

(d) State whether a majority of directors who are not employees of the issuer has retained an unaffiliated representative to act solely on behalf of unaffiliated security holders for the purposes of negotiating the terms of a Rule 13e-3 transaction and/or preparing a report concerning the fairness of such transaction.

(e) State whether the Rule 13e-3 transaction was approved by a majority of the directors of the issuer who are not employees of the issuer.

Plaintiffs contend that in setting forth the factors upon which the fairness determination was made, the proxy statement did not adequately discuss the "going concern value," the "net asset value," or the "liquidation value" of Nationwide. Plaintiffs' argument is not persuasive for a number of reasons. First, plaintiffs are incorrect in asserting that Nationwide was *required* to discuss these factors in the proxy statement. Item 8 does not require the discussion of any factor, it only sets forth the factors which "normally" will be included. Moreover, the detail of the discussion of any single factor will necessarily depend upon the weight, if any, which was placed upon the factor in reaching a fairness decision. Second, each of the factors which plaintiffs contend were not adequately discussed were at least mentioned in the fairness discussion. The statement explains that First

Boston, which independently considered the fairness of the price, considered these factors in reaching its conclusion. Third, and most importantly, the fairness discussion sets forth clearly and in reasonable detail the factors upon which defendants relied in reaching their fairness conclusion.

The proxy statement explained:

> Although the Evaluation Committee did not give specific weight to each of the various factors considered in evaluating the fairness of the proposed merger, particular emphasis was placed upon the receipt of the opinion of First Boston.
>
> The members of the Evaluation Committee believed it to be particularly important that the price to be paid to the public shareholders for their Class A Common shares ($42.50 per share) represented a premium over the quoted bid price of the Class A Common shares on the next to last trading day prior to the public announcement of the proposed merger on November 3, 1982, as reported by the National Quotation Bureau, Inc.
>
> In evaluating the overall fairness of the proposed merger, the Evaluation Committee also considered it significant that First Boston would notify the Corporation on the date hereof and on the date immediately preceding the effective date of the merger if events render the financial terms of the proposed merger unfair to the public shareholders; that the Corporation's Class A Directors (five out of six of whom constitute the Evaluation Committee) would have the authority under the Agreement to terminate the Agreement if a majority of public shareholders fail to approve the proposed merger; that the terms of the Agreement were negotiated by independent legal counsel retained by the Evaluation Committee; that the Agreement may be termi-

> nated in the event the Corporation receives, prior to the special meeting of the shareholders, a bona fide offer to acquire the publicly held Class A Common shares which offer, in the judgment of the Class A Directors, is more favorable to the public shareholders than the proposed merger; and that the Evaluation Committee had been given full authority to evaluate, make recommendations regarding and respond to offers made or proposed to be made to the Corporation by Nationwide Mutual or any of its affiliates. The Evaluation Committee consisted solely of Class A Directors of the Corporation who are neither directors, officers nor employees of Nationwide Mutual or Nationwide Mutual Fire, nor officers or employees of the Corporation.

Considered in its entirety, I would conclude that the fairness discussion contained in the proxy statement satisfies the disclosure requirements set forth in Item 8. In this regard, it is important to emphasize that the issue before us is not whether the price arrived at was fair, but rather, whether the proxy statement adequately discussed the factors upon which Nationwide could reasonably conclude that the price was fair to the unaffiliated shareholders. The methodology employed in this merger to arrive at a price, including an independent appraisal as well as a review by the Evaluation Committee, supplied a reasonable basis for believing that the ultimate price arrived at was fair.

Plaintiffs also argue that the fairness discussion should have disclosed data about other companies involved in "comparative transaction." Neither Rule 13e-3, nor Schedule 13E-3 contain any requirement that a going-private proxy statement provide any comparative data on mergers involving other companies. Moreover, plaintiffs cite no cases to support this argument. Since there is no evidence indicating that Nationwide relied upon such data in reaching its conclusion regarding the fairness

of this transaction, disclosure was not required. In addition, because such information has the potential to mislead, other courts have held that such information is not material and need not be included in a proxy statement. *Mindell v. Greenberg*, 612 F.Supp. 1543, 1551 (S.D.N.Y. 1985) ("The fact that other transactions might have been negotiated on terms plaintiff may have found more favorable is irrelevant"); *Gans v. Filmways, Inc.*, 453 F.Supp. 1116, 1120 (E.D.Pa. 1978), *aff'd*, 595 F.2d 1212 (3d Cir. 1979) ("insurance companies are not fungible entities and the value of one company is not a reliable indication of the value of another").

Plaintiffs also contend that the fairness discussion should have disclosed the "fact" that Nationwide's public stock was "thinly traded." This fact according to plaintiffs would tend to offset the importance of the fact that the price offered by Mutual represented a premium of 51.8% over the stock's market price. This argument conflicts with the well-established rule that the proxy statement must set forth a full and fair picture, without interpretation or characterization. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 474-77, 97 S.Ct. 1292, 1301-1303, 51 L.Ed.2d 480 (1977). As disclosed in the proxy statement, Nationwide's Class A Common stock was traded in the over-the-counter market, and 85.6% of the shares were owned by Mutual. Whether under these circumstances the stock should be characterized as "thinly traded," is difficult to say—which is the reason why this type of conclusion need not be included in a proxy statement. The facts speak for themselves.

I would affirm the district court.

APPENDIX A [To Sixth Circuit Opinion]

The proxy statement provides in pertinent part:

> The members of the Evaluation Committee believe that, from a financial point of view, the terms of the proposed merger are fair to the public shareholders of the Corporation. The committee members considered important, as an indication of the fairness of the proposed merger, the receipt of the written opinion of First Boston. The committee members also considered important a number of other factors discussed with the representatives of First Boston. These factors are the current market price of the Class A Common shares as compared with stock prices of other comparable entities; past and current earnings of the Corporation; past and current price/earnings ratios of the Corporation and other companies having similar operations; past and current price/equity ratios of the Corporation (as computed in accordance with generally accepted accounting principles); and the premium over market price offered to the public shareholders in other similar transactions as well as in other recent acquisitions in the life insurance industry generally. In its discussions with the representatives of First Boston, upon whose opinion the Evaluation Committee has concluded that it is appropriate to rely, these representatives stated that in addition to the above noted factors they had also considered the current overall level of the stock market; historical market prices of the Class A Common shares as compared with market prices for the stock of other comparable entities; going concern value of the Corporation; net book value of the Corporation; liquidation value of the Corporation; various financial ratios; present revenues, expenses, earnings and dividends of the Corporation and trends with respect thereto; the

purchase price paid to holders of Class A Common shares by Nationwide Mutual in connection with the December 1978 tender offer for the Class A Common shares; present value of projected future cash flows of the Corporation; replacement value of the Corporation; off balance sheet items of the Corporation; significant trends in the insurance business; competitive environment of the insurance industry; regulatory environment of the insuranee industry; and the impact of inflation on the Corporation.

Joint Appendix pp. 545-46.

APPENDIX B [To Sixth Circuit Opinion]

The First Boston opinion letter reads in its entirety as follows:

November 1, 1982

Board of Directors
Nationwide Corporation
One Nationwide Plaza
Columbus, Ohio 43216

Gentlemen:

You have asked us to advise you as to the fairness to the shareholders of Nationwide Corporation, other than Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company, of the financial terms of a proposed merger whereby the owners of 685,545 publicly held Class A common shares would receive cash for their shares and Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company would become the only shareholder of Nationwide Corporation. The terms of the merger transaction are that Nationwide Corporation shareholders will be entitled to receive $42.50 for each share of Nationwide Corporation Class A common shares.

In connection with our review, Nationwide Corporation furnished to us certain business and financial data concerning Nationwide Corporation. This information was furnished specifically for the purpose of our advising you as to the fairness of the financial terms of the proposed merger, and our Corporation's representation that the information is complete and accurate in all material respects. We have not independently verified the information. We have also reviewed certain publicly available information that we considered relevant and have had discussions with certain members of Nationwide Corporation's management.

In arriving at our opinion we have also considered, among other matters we deemed relevant, the historical financial record, operating statistics, current financial position and general prospects of Nationwide Corporation and the stock market performance of the Class A common shares of Nationwide Corporation. In addition, we have considered the terms and conditions of the proposed transaction as compared with the terms and conditions of comparable transactions.

Based on our analysis of the foregoing and of such other factors as we have considered necessary for the purpose of this opinion and in reliance upon the accuracy and completeness of the information furnished to us by Nationwide Corporation, it is our opinion that the financial terms of the proposed transaction are fair to the minority shareholders of Nationwide Corporation.

Very truly yours,

THE FIRST BOSTON
CORPORATION

Joint Appendix p. 600.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3929

HOWING COMPANY, *et al.*,
Plaintiffs-Appellants,

v.

NATIONWIDE CORPORATION, *et al.*,
Defendants-Appellees.

[Filed Sept. 24, 1987]

Before: MERRITT, GUY and NORRIS, Circuit Judges

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3929

HOWING COMPANY;
DOUGLAS MCLELLAN,
Plaintiffs-Appellants,

v.

NATIONWIDE CORPORATION;
NATIONWIDE MUTUAL INSURANCE COMPANY,
Defendants-Appellees.

[Filed Oct. 23, 1987]

ORDER STAYING MANDATE

Upon consideration, it is ORDERED that the motion to stay issuance of the mandate pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed until the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. Section 2101 or Rule 20 of the Supreme Court Rules, as applicable. However, if within such time, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Upon the filing of a copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

UNITED STATES DISTRICT COURT
S.D. OHIO, W.D.

Nos. C-1-83-1693, C-2-82-1385

HOWING COMPANY, *et al.*,
Plaintiffs,

v.

NATIONWIDE CORPORATION, *et al.*,
Defendants.

BELLE EFROS,
Plaintiff,

v.

NATIONWIDE CORPORATION, *et al.*,
Defendants.

Oct. 18, 1985

William R. Jacobs, Douglas G. Cole, Cincinnati, Ohio, for plaintiffs Howing Co., et al.

Kenneth R. Cookson, Columbus, Ohio, Gene Mesh, Cincinnati, Ohio, for plaintiff Efros.

Frederick J. McGavran, Cincinnati, Ohio, Jeffrey Davidson, Daniel Attridge, John Whatley, Kirkland & Ellis, Washington, D.C., for defendants.

OPINION AND ORDER

SPIEGEL, District Judge.

PROCEEDINGS

This matter came on for consideration and decision on the oral arguments of the parties on defendants' motion for summary judgment (doc. 95), with exhibits attached, defendants' corrected memorandum in support (doc. 96), plaintiffs' cross-motion for partial summary judgment (doc. 99), and memorandum in opposition to defendants' motion for summary judgment (doc. 100), with exhibits, defendants' reply memorandum in support of their motion for summary judgment (doc. 103), plaintiffs' supplemental memorandum in support of their motion for partial summary judgment and *contra* defendants' motion for summary judgment (doc. 105), which we granted leave to plaintiffs to file at the oral arguments held on September 30, 1985, defendants' supplemental memorandum in support of their motion for summary judgment (doc. 106), and supplemental memorandum of plaintiffs regarding issues of exclusivity of appraisal proceedings (doc. 107).

FACTUAL BACKGROUND

In this litigation, plaintiffs challenge the 1983 merger between Nationwide Corporation (Nationwide Corp.) and First Plaza Corporation (First Plaza), in which Nationwide Corp. became solely owned by Nationwide Mutual Insurance Corp. (Nationwide Mutual) and its affiliate Nationwide Mutual Fire Insurance Company (Nationwide Fire). The shares of Class A common stock of Nationwide Corp. were converted under the terms of the merger into the right to receive $42.50 per share in cash, or the fair cash value thereof, under Section 1701.85, O.R.C.

The corporate structure of defendants is as follows: Nationwide Mutual was the owner of 85.6% of the out-

standing Class A common shares of Nationwide, and Nationwide Mutual and Nationwide Mutual Fire Insurance Company owned 100% of the outstanding Class B common share of Nationwide. The public owned the remaining 14.4% of the outstanding Class A common shares of Nationwide. Nationwide Mutual is the parent of a number of subsidiary corporations, including Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Michigan Life Insurance Company, West Coast Life Insurance Company, Gulf Atlantic Life Insurance Company, and National Casualty Company.

Nationwide Mutual is engaged in the business of holding substantial or controlling stock interests, primarily in life insurance and financial service corporations.

Nationwide's proxy statement of December 9, 1982 accurately recounts the history of the proposed merger:

> In September, 1982, certain officers of Nationwide Mutual informally approached the President of the Corporation proposing the transaction. They discussed the general terms of the possibility of an acquisition by Nationwide Mutual of the remaining publicly held Class A common shares of the corporation for cash. They also proposed affecting a similar acquisition with respect to the outstanding publicly held shares of stock of Nationwide Life, the principal operating subsidiary of the Corporation. . . . In each transaction, Nationwide Mutual proposed that the public shareholders would receive cash for their shares. The president subsequently contacted the two other members of the executive committee of the Board of Directors of the Corporation who were not directors, officers, or employees of Nationwide Mutual or Nationwide Mutual Fire. The President reported on his discussions concerning the proposal. Following their preliminary discussions, those unaffiliated members of the corporation's Executive

Committee retained independent legal counsel to advise them in respect of the proposal and to represent the interest of the public shareholders of the Corporation.

At a special meeting of the directors held on November 2, 1982, the directors of the Corporation were advised that on the following day the Investment Committee of Nationwide Mutual's Board of Directors would recommend to its full Board, and Nationwide Mutual's Board of Directors would consider, a proposal which, if made and accepted, would provide for the merger of the corporation and First Plaza, newly created, wholly owned subsidiary of Nationwide Mutual. As part of the proposal, the corporation would become a wholly owned subsidiary of Nationwide Mutual and Nationwide Mutual Fire, and the corporation's public shareholders would receive $42.50 per share in cash for the Class A common shares. The Corporation's directors were advised that the price to be paid to the public shareholders for their shares had been set by Nationwide Mutual's Investment Committee to reflect a fair value thereof as determined by the First Boston Corporation ("First Boston").

Immediately thereafter, the Board of Directors of the Corporation appointed a special Evaluation Committee, consisting of the corporation's five Class A Directors who are neither directors, officers, nor employees of Nationwide Mutual or Nationwide Mutual Fire, nor employees of the Corporation, to consider the proposal and to make a recommendation in respect thereof to the full board. The Evaluation Committee was given full authority to hire any professional advisers which it deemed necessary to fulfill its responsibility.

The Evaluation Committee then met that morning to consider engagement of independent counsel to

represent the interests of the public shareholders and to advise the Evaluation Committee in respect to the proposed merger. The Evaluation Committee determined to retain the special counsel previously engaged to advise the unaffiliated members of the Executive Committee in respect of the proposal, and immediately thereafter met with such independent counsel to consider the proposal. Counsel advised the members of the Evaluation Committee of their fiduciary responsibilities to the public shareholders, and recommended that the Evaluation Committee meet with representatives of First Boston to consider the adequacy of the price from a financial point of view. Counsel also advised the Evaluation Committee of the need to consider, and the Evaluation Committee considered the statements of officers of both the corporation of Nationwide Mutual in respect of the existence of a proper business purpose for such a transaction.

On the afternoon of November 2, 1982, the Evaluation Committee met with representatives of First Boston, who at that time reported to the members of the Evaluation Committee that in First Boston's opinion, the proposed price of $42.50 per share was fair to the public shareholders of the corporation from a financial point of view. . . . After further consultation with counsel in respect of the proposal, and after reviewing in detail the report of First Boston in respect of the fairness of the proposed price, and discussing with representatives thereof the terms of its engagements and the scope of its opinion, the Evaluation Committee determined to recommend to the full Board of Directors of the Corporation that the Corporation accept Nationwide Mutual's proposals made on the terms presented to the Evaluation Committee.

On the following day, November 3, 1982, the Board of Directors of the Corporation met in joint session

> with the Boards of Directors of Nationwide Mutual and Nationwide Mutual Fire, and Nationwide Mutual formally presented the proposal to the Corporation. . . . The joint session was addressed by representatives of First Boston in respect of the proposed price payable to the public shareholders of the Corporation for their Class A Common shares . . . Upon review of the report of the First Boston at the joint session, and based upon the recommendation of the Evaluation Committee in respect of the proposal, the Board of Directors of the corporation unanimously voted to enter into an agreement merger with First Plaza, a wholly-owned subsidiary of Nationwide Mutual, whereby the corporation would become solely owned by Nationwide Mutual and Nationwide Mutual Fire, and the public shareholders of the Corporation would receive $42.50 in cash for their Class A Common shares. Pursuant thereto, the Corporation, Nationwide Mutual, and First Plaza entered into the agreement of merger.

(doc. 95, Exhibit A, pp. 9 and 10). When the proposed merger was publicly announced on November 3, 1982, the closing bid price of the previous day for the Class A common shares was $28 per share. The merger price of $42.50 represented a premium of 51.8% over the market price, and the merger price was equal to 106% of the June 30, 1982 per share book value of $40.20 and 12.1 times the previous 12 months per share earnings at $3.51.

The proxy materials were distributed to approximately 4,000 public stockholders on December 9, 1982, describing the history and purpose of the proposed transaction, and the action taken by the First Boston and the Evaluation Committee, and contained extensive Nationwide financial information. The materials notified the stockholders of the special meeting to be held January 18, 1983 for the purpose of voting on the merger, and also notified the stockholders of the right to seek judicially determined

fair cash value under Ohio Revised Code § 1701.85. Mrs. Efros filed her complaint against Nationwide on November 9, 1982 a preliminary injunction which was denied on January 14 (docs. 16 and 17) and Findings of Fact and Conclusions of Law filed on January 17, 1983 (doc. 20 and 21). Following the denial of Mrs. Efros' motion for a preliminary injunction, the merger was approved by Nationwide public stockholders at the January, 1983 meeting with 94.7% of the voted public shares favoring the merger. None of the named plaintiffs in this litigation participated in the balloting, nor did any shareholder elect to proceed in the Ohio courts to determine the fair cash value pursuant to the remedies available in Section 1701.85 of the Ohio Revised Code.

QUESTIONS PRESENTED

The complaints filed by Mrs. Efros, the Howing Company, and Douglas McClellan, allege that Nationwide has violated the Federal Securities Law by making false and misleading statements in its announcement of the proposed merger. The defendants have vigorously denied them.

The pleadings, cross-motions for summary judgment, and the oral arguments of the defendants contend that plaintiffs' position does not present a cognizable claim under the Federal Securities Laws. Defendants argue that Nationwide Corp.'s materials contain no material misrepresentation or omissions required under the Federal Securities Laws, that since there has been full disclosure by defendants, plaintiffs' claim that the merger was unfair is not a cognizable claim under the Federal Securities Laws, that the issue of fairness actually relates to the adequacy of the price per share, and that if plaintiffs were dissatisfied with the price, the only available remedy was that provided by Ohio Revised Code Section 1701.85 for judicially determined fair cash value. Finally, defendants contend that there is no evidence of

any breach of fiduciary duty owed plaintiffs by defendants, and since, under Ohio corporation law the merger was neither unauthorized by statute, illegal, nor ultra vires, Ohio statutory appraisal rights constituted plaintiffs' exclusive state law remedy.

Plaintiffs, in opposition to defendants' motion for summary judgment contend that there are genuine issues of of material fact relating to the determination and fairness of the merger price, and in support of their motion for partial summary judgment, argue that the proxy statement of Nationwide failed to meet the disclosure requirements imposed by Rule 13e-3, 17 C.F.R. § 240.13e-3. Specifically, they contend that the proxy statement failed to disclose the detriments and benefits resulting from the merger, failed to disclose the reasons for the timing of the transaction, failed to comply with the requirements of Rule 13e-3 that the fairness of the merger be discussed in reasonable detail, failed to address all material factors relating to value, and that there was an inadequate discussion of the market price and the First Boston's opinion.

At oral argument, the parties agreed that there really are no contested issues of fact, and that the disposition of this litigation can be decided on what has been filed with the Court in support of the cross-motions for summary judgment.

DECISION

We begin our analysis by recognizing that Rule 13e-3 promulgated pursuant to Section 13 of the Act establishes the standard of conduct that must be met by an issuer in this type of transaction. What we have here is a freeze-out merger. Rule 13e-3 relates to going private transaction by certain issuers or their affiliates. The disclosure requirements in a freeze-out merger proxy statement are more extensive than those in other types of proxies as noted by Judge Merritt in *Radol v. Thomas*, 772 F.2d 244 (6th Cir. 1985). Judge Merritt notes:

> The more extensive legal disclosure requirements which apply to freeze-out merger proxy statements are therefore justified by the fact that the law has given the majority the power to foreclose the ownership rights of the minority and has thereby eliminated the market as a correcting mechanism, leaving minority shareholders with only the option of dissent and appraisal, an option which cannot rationally be exercised unless the majority is compelled to make full disclosure regarding appraisals, earnings projections, and other information that sheds light on the value of the firm.

Id. at pp. 254-55.

We therefore will review the proxy material of Nationwide Corporation to see if it meets the standards of disclosure required by Rule 13e-3. If in any instance there has been a failure to meet the standard, we will then examine whether such failure constitutes a material breach, and if we conclude that there is a jury question concerning the materiality of the breach, then, of course, there would be a genuine issue of fact to be determined. The test for materiality which we will utilize and which the parties agreed is appropriate in this situation is the test applied by the Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 (1976), whether there is a "substantial likelihood that, under all the circumstances the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholders." Thus, if we conclude that there is no substantial likelihood that the omission would have been significant in the deliberation of a reasonable shareholder, then there would be no question for a jury to decide. Otherwise, it will be left to the trier of fact to decide whether there has been a material misstatement or omission that falls below the standard mandated by Rule 13e-3 and, if so, the jury must then determine the reasonable value of the stock

which plaintiffs' class should have been paid at the time the merger was consummated.

At the oral argument and in the briefs, in a further attempt to focus on the issues of this case, the parties agree that the issue of liability was a matter of law for resolution by the Court since there exists no relevant or material conflicts in testimony or other issues appropriate for a jury, and plaintiffs' complaint can be boiled down to three general contentions. First, that the proxy statement did not sufficiently discuss the detriments and benefits resulting from the merger; second, that the proxy statement did not sufficiently discuss the timing of the merger proposal; and, third, that the proxy statement did not discuss the fairness of the merger in sufficient detail.

I. Our examination begins with a review of the proxy statement and Item 7 of Schedule 13e-3, 17 C.F.R. § 240.13e-100, in order to determine whether the statement sufficiently discusses the detriments and resulting benefits from the merger.

Based upon our review of the proxy statement, we conclude that the requirement of a reasonably detailed discussion of the benefits and detriments was set forth prominently in the forepart of that document. The portion of the proxy statement entitled "Effect of the Transaction" disclosed that upon successful completion of the merger, First Plaza would cease to exist and that Class A Common shareholders would receive $42.50 per share, which was substantially over market value and book value. The proxy statement proceeded to explain the possible tax consequences of the transaction and the fact that the public stockholders' interests would be extinguished.

The parties agree that the proxy statement contains a discussion of the intended benefits to Nationwide Mutual under the portion of the statement entitled "Purposes of

the Transaction." However, plaintiffs contend that the information therein is not meaningful as the discussion is "boilerplate" and contains "patently contrived excuses for eliminating the minority interests." We disagree. The statement discloses four distinct purposes for the transaction. First, the elimination of public shareholder interests would alleviate potential conflict of interest problems presented by the presence of minority shareholder interests in respect to transactions involving the Corporation and its affiliates; second, the proposed merger would increase management flexibility; third, elimination of public shareholder interests would permit management to simplify management structure in order to avoid duplication of efforts; and fourth, the merger would result in the elimination of substantial costs in servicing the public shareholders. The proxy statement further notes that "Nationwide Corporation and Nationwide Mutual have not placed a monetary value on the benefits to be derived from the proposed transaction."

We recognize that the benefits to Nationwide Mutual may be difficult, if not impossible, to accurately quantify and conclude that the benefits to Nationwide Mutual resulting from the elimination of public shareholders were sufficiently set forth. Furthermore, there may be sound business reasons for not making such a quantification. We agree with Judge Rubin, who, after examining these identical four purposes, stated that "any attempt to quantify such expectations [anticipated advantages of the merger] might be met with legitimate charges of misrepresentation." *Efros v. Nationwide Corp.*, [1982-83] Fed. Sec. L. Rep. (CCH) ¶ 99,077 (S.D. Ohio 1983). We are reluctant to say that the purposes for the merger articulated in the proxy statement were contrived. "The business judgment rule recognizes that many important corporate decisions are made under conditions of uncertainty, and it prevents courts from imposing liability on the basis of judicial hindsight. . . ." *Radol v. Thomas*,

772 F.2d at 257. We decline to second guess the directors of Nationwide as to the stated purpose for the merger and decline to quantify the benefits and detriments of the merger ourselves.

Plaintiffs further argue that the fact Mutual was financing the transaction from its own funds and that Mutual was sacrificing annual income of three million dollars to achieve the merger was a material fact which should have been disclosed. Plaintiffs' argument is not well-taken as the proxy statement clearly disclosed that Nationwide Mutual was providing the funds to finance the transaction, and we are not convinced that defendants were required to do more than that. Furthermore, a shareholder could surmise the approximate amount Nationwide Mutual was paying for the total number of Class A shares by reviewing the detailed financial information contained in the proxy statement.

Finally, plaintiffs contend that the proxy statement should have disclosed that as a result of the merger, Mutual would obtain a complete ownership interest in Nationwide and its assets at a proportionate value substantially in excess of the cash-out price. However, as we noted previously, many of the benefits of the transaction are unquantifiable, and it would be an imposition upon the business judgment of the drafters of the proxy statement to require them, in hindsight, to quantify these benefits. Moreover, we find that the financial picture was fully disclosed and therefore a reader of the proxy statement could easily determine that one of the advantages of the merger might be that Mutual would gain additional assets from the transaction.

We conclude that the detriments and benefits were adequately discussed in the proxy statement and that the gravamen of plaintiffs' argument on this issue is actually that the merger price itself was not fair to the public stockholders. However, our concern is not the

specific terms of the transaction, but rather, whether there was full disclosure in the proxy statement, *Santa Fe Industries v. Green*, 430 U.S. 462, 477-78, 97 S.Ct. 1292, 1302-03, 51 L.Ed.2d 480 (1977) and we find that requirement was satisfied.

II. The second part of our analysis concerns whether the proxy statement adequately disclosed the reasons for undertaking the transaction at the particular time in question, as required by Item 7 to Schedule 13E-3. The reason given in the proxy statement was that "the position of the Nationwide Companies in the insurance industries requires them to increase flexibility and maximize cost savings to maintain their competitive position in the industry." The plaintiffs dismiss this statement as meaningless because that statement "would be true at any time." Furthermore, they assert that the earnings projections made by First Boston and Nationwide regarding future increases in earnings should have been disclosed in the proxy statement, as that was the true undisclosed purpose for undertaking the transaction at that particular time. Again, plaintiffs ask us to second guess the directorial actions and replace their judgment with our own judgment or opinion as to why the transaction was undertaken. We decline to do so. We conclude that defendants were not required to disclose earnings projections in the proxy statements. Judge Merritt noted in *Radol v. Thomas*, 772 F.2d 244:

> In *Starkman v. Marathon Oil Co.*, 722 F.2d 231 (6th Cir. 1985), we have reaffirmed our adherence to the basic rule established by our prior decisions that tender offer materials must disclose soft information, such as these asset appraisals based upon predictions regarding future economic and corporate events, *only if the predictions underlying the appraisal are substantially certain to hold.*

Id. at 252 (emphasis added).

In *Biechele v. Cedar Point, Inc.*, 747 F.2d 209 (6th Cir. 1984), the Court held that a target's failure to disclose an appraisal based upon cash flow and earnings projections, intended to be used as a selling document in merger negotiations, did not violate Rule 10b-5, as the "selling document" and valuation based upon replacement cost of assets could be misleading to the shareholder. We conclude that the earnings projections made by First Boston and Nationwide was "soft" information, not substantially certain to hold, and therefore, it was not required to be disclosed under the proxy laws.[1]

III. Finally, we must determine whether the proxy statement complied with the requirements of Item 8 of Schedule 13E-3 that the fairness of the merger be discussed in reasonable detail. Plaintiffs acknowledge that the proxy statement specifically states that the members of the Evaluation Committee believed the transaction was a fair one. However, plaintiffs assert that the belief must be expressed as a reasonable one, which was not the situation here because the "Evaluation Committee and Board of Directors could not possibly have a sufficient basis to form a reasonable opinion." Plaintiffs correctly point out that Schedule 13E-3 requires a discussion, in reasonable detail, of all material factors upon which the reasonable belief as to fairness is based and to the extent practicable, the weight to be assigned to each factor. The rule provides that:

> Such discussion should include an analysis of the extent, if any, to which such belief is based on the factors set forth [below] and Item 9.[2]

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[1] Additional discussion about the disclosure of earnings projections in proxy statements is contained in the portion of our Opinion addressing plaintiffs' contention that the proxy statement did not discuss the First Boston opinions in sufficient detail.

[2] The facts include current and historical market price of the stock, the book, liquidation and going concern values of the corporation; and the price paid in previous purchases. Item 9 requires

17 C.F.R. § 240.13e-100.

The fairness opinion rendered by Nationwide in the proxy statement, in pertinent part, was as follows:

> [T]he directors considered important, (i) the various business purposes addressed by management which the proposed merger will accomplish (see "SPECIAL FACTORS—Purposes of the Transaction"); (ii) the written opinion of First Boston to the effect that the financial terms of the proposed merger were fair to the public shareholders of the Corporation (a copy of which is attached to this Proxy Statement as EXHIBIT II); and (iii) the report of the Evaluation Committee, that it believed the financial terms of the proposed merger to be fair to the public shareholder, based upon both First Boston's opinion and its review with representatives of First Boston of the terms and conditions of First Boston's engagement, and the scope of the investigation in giving the opinion.
>
> The Evaluation Committee carefully reviewed with representatives of First Boston the terms of its engagement in this matter, particularly in respect of its relationship with Nationwide Mutual. The members of the Evaluation Committee concluded that, based upon its discussions with such representatives, it was appropriate in this case to rely upon First Boston's valuation and opinion in determining the fairness of the financial terms of the proposed merger to the public shareholders.
>
> The members of the Evaluation Committee believe that, from a financial point of view, the terms of the proposed merger are fair to the public shareholders of the Corporation. The committee members

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the issuer or affiliate to state whether it has received any report, opinion or appraisal from an outside party which is materially related to the Rule 13e-3 transaction.

considered important, as an indication of the fairness of the proposed merger, the receipt of the written opinion of First Boston. The committee members also considered important a number of other factors discussed with the representatives of First Boston. These factors are the current market price of the Class A Common shares as compared with stock prices of other comparable entities; past and current earnings of the Corporation; past and current price/earnings ratios of the Corporation and other companies having similar operations; past and current price/equity ratios of the Corporation (as computed in accordance with generally accepted accounting principles); and the premium over market price offered to the public shareholders in this transaction as compared to recent premiums paid to minority shareholders in other similar transactions as well as in other recent acquisitions in the life insurance industry generally. In its discussions with the representatives of First Boston, upon whose opinion the Evaluation Committee has concluded that it is appropriate to rely, these representatives stated that in addition to the above noted factors they had also considered the current overall level of the stock market; historical market prices of the Class A Common shares as compared with market prices for the stock of other comparable entities; going concern value of the Corporation; net book value of the Corporation; liquidation value of the Corporation; various financial ratios; present revenues, expenses, earnings and dividends of the Corporation and trends with respect thereto; the purchase price paid to holders of Class A Common shares by Nationwide Mutual in connection with the December 1978 tender offer for the Class A Common shares; present value of projected future cash flows of the Corporation; replacement value of the Corporation; off balance sheet items of the Cor-

poration; significant trends in the insurance business; competitive environment of the insurance industry; regulatory environment of the insurance industry; and the impact of inflation on the Corporation.

Although the Evaluation Committee did not give specific weight to each of the various factors considered in evaluating the fairness of the proposed merger, particular emphasis was placed upon the receipt of the opinion of First Boston. The members of the Evaluation Committee believed it to be particularly important that the prices to be paid to the public shareholders for their Class A Common shares ($42.50 per share) represented a premium over the quoted bid price of the Class A Common shares on the next to last trading day prior to the public announcement of the proposed merger on November 3, 1982, as reported by the National Quotation Bureau Inc.

The plaintiffs advance three arguments in regard to the fairness opinion. First, that the proxy statement did not sufficiently discuss the net book value, liquidation value, and going concern value of Nationwide; second, that the proxy statement did not explicitly state that the Nationwide stock was "thinly traded"; and third, that the proxy statement did not sufficiently discuss the basis for the First Boston fairness opinion.

As to plaintiffs' first contention, we note that the proxy statement contained extensive financial information necessary to compute the net book, liquidation, and going concern values of Nationwide shares. Plaintiffs have offered no case which has held that more is required. On the other hand, defendants point out numerous cases, decided subsequent to the promulgation of Rule 13e-3, where proxy statements were upheld, containing no more detailed discussions of net book value, liquidation value,

and going concern values than the discussion contained in the proxy statement in question. *Radol v. Thomas*, 534 F.Supp. 1302, 1315-17 (S.D. Ohio 1982); *Berg v. First American Bankshares, Inc.*, [1984-85] Fed.Sec.L. Rep. (CCH) ¶ 92,011 (D.D.C. 1985); *Nutis v. Penn Merchandising Corp.*, 610 F.Supp. 1573 (E.D.Pa. 1985). Rule 13e-3 "merely requires that an opinion be given and the material factors on which it is based be disclosed." *Radol*, 534 F.Supp. at 1316. We conclude that defendants satisfied this requirement of Rule 13e-3 by listing the factors considered by the Evaluation Committee and by candidly stating that no specific weight was given to any one factor, but of particular importance in the consideration was First Boston's opinion and the fact that the merger price represented a premium over the market price of the stock.

Plaintiffs strongly urge that Nationwide was required to discuss the fact that "significant balance sheet items, even though reported in accordance with GAAP, actually understate the assets, understate the liquidity of the company, and overstate liabilities by significant amounts." Plaintiffs contend that Nationwide was required to disclose that most life insurance companies are valued substantially in excess of book value or net asset value because GAAP reporting tends to understate net asset and liquidity values. Plaintiffs have not offered any authority which would require defendants to make such a disclosure. Moreover, we are persuaded by the fact that Peat, Marwick, Mitchell & Co., independent outside auditors, reviewed the financial information contained in the proxy statement and opined that "such financial statements present fairly the financial position of Nationwide Corporation and its subsidiaries, . . . in conformity with generally accepted accounting principles applied on a consistent basis." We are further persuaded by the testimony of plaintiffs' own expert who stated that he was unable to single out anything about the financial information which was inaccurate or misleading (Clark deposi-

tion, p. 153). From the foregoing, we conclude that the proxy statement adequately set forth the net book, liquidation, and going concern value of Nationwide shares.

Plaintiffs' second contention relating to the "fairness' requirement of Rule 13e-3 is that Nationwide should have disclosed that the stock was "thinly traded." We disagree. The proxy statement disclosed that Nationwide Mutual owned 85.6% of the outstanding Class A shares, the number of publicly held shares, the number of public stockholders, and that the stock was traded only in the "over-the-counter market." We are mindful of the universal rule that a proxy statement need only set forth the full and fair picture, without interpretation or characterization, so that a reasonably prudent stockholder can make an intelligent decision, whether the question arises in a suit brought under §§ 14(a) or (e) or 10(b) and Rule 10b-5. *Santa Fe Industries, Inc. v. Green*, 430 U.S. at 474-77, 97 S.Ct. at 1301-03; *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757; *Golub v. PPD Corp.*, 576 F.2d 759 (8th Cir. 1978). We conclude that this statement of the law is also applicable to a claim under Rule 13e-3. While recognizing that the freeze-out merger situation requires more stringent legal disclosure requirements, *Radol v. Thomas*, 772 F.2d 244, we do not believe that the more extensive disclosure requirements should cause us to lose sight of the purpose of the proxy statement, which is to provide enough information so that the shareholder can draw his own conclusions and make his own decisions. After reviewing the proxy statement, we conclude that enough information was provided therein to allow a reasonably prudent shareholder to make his own characterization of the market for Nationwide stock.

Finally, plaintiffs argue that the proxy statement contained an inadequate discussion of the First Boston opinions, that the proxy statement should have disclosed the method utilized in determining the $42.50 price, and that

First Boston never determined the intrinsic value of Nationwide or its stock. More specifically, plaintiffs contend that the proxy statement fails to set forth projected growth rates and increase of earnings. We conclude that such projections were not required to be disclosed. "[T]he law mandates disclosure only of existing material facts. It does not require . . . any economic forecasts." *Arber v. Essex Wire-Corporation*, 490 F.2d 414 (6th Cir. 1974).

The most recent pronouncements by the Sixth Circuit reaffirm this basic rule in the context of Rule 13e-3. In *Starkman v. Marathon*, 772 F.2d 231, the Court stated:

> With respect to asset appraisals, Rule 13e-3, 17 C.F.R. § 240.13e-3 requires disclosure of the information called for by Items 7, 8, and 9 of Schedule 13E-3, 17 C.F.R. § 240.13e-100, in the context of freezeout mergers. Item 8 of Schedule 13E-3 requires disclosure of factors important in determining the fairness of such a transaction to unaffiliated shareholders, and these factors include liquidation value; Item 9 of that same schedule says that a summary of any outside appraisal must be furnished, with the summary including a discussion of the procedures and methods of arriving at the findings and recommendations of the appraisal. However, a 1979 SEC-proposed amendment under which an issuer would have to disclose any projection given to an appraisal furnisher was never adopted, *see* 2 Fed. Sec.L.Rep. (CCH) ¶ 23,706, at 17,245-21 through 21A, and, even more importantly, in *Radol v. Thomas*, 772 F.2d 244 (6th Cir. 1985), we have rejected the position that SEC rules regarding freezeout mergers and proxies should determine the disclosure obligations of target management in the first stage of a two-tier tender offer.

Id. at 240.

The Court, in *Starkman*, further noted that the disclosure of "soft" information such as appraisals and earnings projections is required only when "the reported values are virtually as certain as hard facts," *Id.* at 241, and that earnings and cash flow projections do not rise to the level of substantial certainty triggering a duty to disclose. *Id.* at 242 (citing *Biechele v. Cedar Point*, 747 F.2d 209 (6th Cir. 1984) and *James v. Gerber Products Co.*, 587 F.2d 324, 327 (6th Cir. 1978)). In the companion case of *Radol v. Thomas*, 772 F.2d 244, the Court specifically approved the instruction that a "failure to make known a projection of future earnings is not a violation of the Federal Securities Law." *Id.* at 252. Therefore, we conclude that defendants were not required to disclose projected growth rates and future increase of earnings.

Additionally, plaintiffs argue that the discussion of the First Boston Opinion should have disclosed information regarding comparable life insurance companies as such information would reveal the unfairness of the cash out price. Specifically, plaintiffs contend that the shareholders should have been told that First Boston stated that acquisition of life insurance companies generally range from one to four times book value. On this point, we find the reasoning of the Court in *Gans v. Filmways, Inc.*, 453 F.Supp. 1116 (E.D.Pa. 1978) to be persuasive:

> [I]nsurance companies are not fungible entities and the value of one company is not a reliable indication of the value of another. Secondly, and perhaps more importantly, the notion of book value is of little if any help in determining the actual value of a share of stock. As Chief Judge Lord of this district has noted, the 'suggestion that book value is any indication of the real value of shares of stock has long been discredited, and should not have been resurrected for the purposes of this proxy solicitation.' Because book value has no relation to real value,

> it is indisputable that a reasonable investor would not consider the ratio of book value to exchange rate in other sales of insurance companies of any importance in deciding how to vote on this particular merger.

Id. at 1120 (citations and footnotes omitted).

There is no indication that there was anyone or any other entity, besides Mutual, interested in purchasing Nationwide. Therefore, the alleged omission of "comparable values" was immaterial and indeed such information may have been misleading if discussed.

CONCLUSION

From the foregoing, we conclude that defendants' proxy statement satisfied the requirements of Rule 13e-3 and explanatory schedules relating thereto. Most important, there was sufficient information disclosed in the proxy statement to enable the stockholders to make an informed decision on what to do. It is the conclusion of the Court, therefore, that there is no genuine issue of material fact concerning the adequacy of the proxy statement when measured against the standards set forth in Rule 13e-3, and that any omissions pointed out by plaintiffs were not material as defined by the Court in *TSC Industries, Inc.*, 426 U.S. at 449, 96 S.Ct. at 2132.

Having concluded that the disclosure requirements of Rule 13e-3 were satisfied, all that remains of plaintiffs' claim is actually a controversy over the adequacy of the price paid per share, which is not a cognizable claim under the Federal Securities Law. *Marsh v. Armada Corp.*, 533 F.2d 978, 979 (6th Cir. 1976), *cert. denied*, 430 U.S. 954, 97 S.Ct. 1598, 51 L.Ed.2d 803 (1977). Moreover, since there is no evidence of any breach of fiduciary duty owed plaintiffs by defendants, and the merger was neither unauthorized by statute, illegal nor ultra vires under Ohio corporation law, the Ohio statutory appraisal right constituted plaintiffs' exclusive state

law remedy. Plaintiffs have failed to avail themselves of that remedy. We note that the merger was approved by an overwhelming 94.7% of the voted public shares and no shareholder elected to proceed in the Ohio courts to determine the fair cash value of the stock pursuant to § 1701.85 of the Ohio Revised Code. We will not permit them now to pursue their state claim, disguised as a violation of federal securities law, in Federal Court. Consequently, judgment shall be entered for defendants dismissing the amended complaint.

SO ORDERED.

EXCERPTS FROM NATIONWIDE PROXY STATEMENT

(full text of proxy statement appears at JA 533-605)

December 9, 1982

NATIONWIDE CORPORATION
One Nationwide Plaza
Columbus, Ohio 43216

TO THE SHAREHOLDERS OF NATIONWIDE CORPORATION:

The Board of Directors of Nationwide Corporation (the "Corporation"), and First Plaza Corporation ("First Plaza"), have approved an Agreement of Merger between the Corporation and First Plaza. As more fully described in the Proxy Statement, the Agreement provides for the merger of First Plaza into Nationwide Corporation with Nationwide Corporation as the surviving corporation. Under the terms of the Agreement, Class A Common shareholders of Nationwide Corporation will receive $42.50 cash per share of Nationwide Corporation Class A Common stock owned and all presently outstanding Class A Common shares will be cancelled as of the effective date of the merger.

In accordance with the attached Notice, the shareholders of the Corporation will consider and vote upon the merger at a special meeting of shareholders to be held January 18, 1983. The merger is subject to the affirmative vote of the holders of not less than one-half of the outstanding shares of the Corporation. Assuming approval of the merger by the shareholders of the Corporation, and upon obtaining such authorizations as may be required by the appropriate regulatory authorities, it is expected that the merger will be consummated by the end of the first quarter of 1983.

As of this date, Nationwide Mutual Insurance Company owns 85.6% of the outstanding Class A Common shares and Nationwide Mutual and Nationwide Mutual Fire Insurance Company own 100% of the outstanding Class B Common shares of Nationwide Corporation. Both of these companies intend to vote in favor of the merger. The Class A Directors have reserved the right to terminate the merger in the event a majority of the publicly held Class A Common shares represented at the meeting do not vote in favor of the merger. Consequently, your vote is important.

You are urged to sign and promptly return the enclosed Proxy whether or not you expect to attend the meeting in person. Any person attending the meeting may revoke or change his or her Proxy at that time if he or she so desires.

John E. Fisher
General Chairman

* * * *

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NATIONWIDE CORPORATION
ONE NATIONWIDE PLAZA
COLUMBUS, OHIO 43216

PROXY STATEMENT

INTRODUCTION

This Proxy Statement is furnished in connection with the solicitation of proxies by the Board of Directors of Nationwide Corporation (the "Corporation"), an Ohio corporation, to be voted at a special meeting of shareholders of the Corporation to be held on January 18, 1983, at its principal office at One Nationwide Plaza, Columbus, Ohio, or at any adjournment or adjournments thereof. This Proxy Statement was first mailed to the shareholders of the Corporation on December 9, 1982.

At the special meeting, Nationwide Corporation shareholders are being asked to approve an Agreement of Merger between Nationwide Corporation and First Plaza Corporation ("First Plaza"), a wholly-owned subsidiary of Nationwide Mutual Insurance Company ("Nationwide Mutual"). The Agreement of Merger, which is described below, provides that the shareholder of First Plaza (Nationwide Mutual), will become the only Class A Common shareholder of Nationwide Corporation and that the Class A Common shareholders of Nationwide Corporation before the merger will receive $42.50 for each share that is owned by them. The Agreement of Merger also provides that the Class A Directors may terminate the Agreement under certain circumstances. One of these circumstances is in the event the holders of a majority of the Class A Common shares represented at the meeting not owned by Nationwide Mutual do not approve the Agreement of Merger. (See "THE MERGER--Termination of the Merger.")

The cost of soliciting proxies in the enclosed form will be borne by Nationwide Mutual. Nationwide Mutual has

agreed to pay or reimburse the Corporation for its expenses in connection with the special meeting and the proposed merger transaction. In addition to the use of the mails, proxies may be solicited personally or by telephone or telegraph by officers and employees of the Corporation, without any compensation other than their regular compensation. The Corporation will request brokers, dealers, banks and voting trustees, or their nominees to solicit proxies from the beneficial owners of common shares held of record by those to whom such request is made; will furnish copies of proxy soliciting materials for such beneficial owners; and will, upon request of each such record holder, pay reasonable expenses for completing the mailing of such material to such beneficial owners.

SUMMARY OF CERTAIN INFORMATION CONTAINED IN THE PROXY STATEMENT

The following is a brief summary of certain information contained elsewhere in the Proxy Statement. This summary does not purport to be complete and should be read in conjunction with the more detailed information presented elsewhere within this Proxy Statement and the exhibits attached hereto.

The Meeting

Time, Date and Place—The special meeting of Nationwide Corporation shareholders will be held at 10:30 a.m. (local time) on January 18, 1983 at One Nationwide Plaza, Columbus, Ohio.

Record Date—Only holders of Common shares of Nationwide Corporation at the close of business on November 19, 1982, are entitled to notice of and to vote at the special meeting of shareholders. (See "VOTING RIGHTS.")

The Merger

The Parties—Nationwide Corporation ("Corporation") and First Plaza Corporation ("First Plaza") propose to merge with each other. Nationwide Corporation will be the surviving corporation. Nationwide Corporation is engaged in the business of holding substantial or controlling stock interests in other companies. Through subsidiary holdings, the Corporation is primarily engaged in the life insurance, accident and health insurance, and annuity business. Through other subsidiary holdings, the Corporation engages in other financial services activities. (See "BUSINESS AND OPERATIONS OF NATIONWIDE CORPORATION.") First Plaza, a wholly-owned subsidiary of Nationwide Mutual Insurance Company ("Nationwide Mutual"), was formed for the merger transaction and is not engaged in any business. (See "FIRST PLAZA CORPORATION.")

Principal Terms—Nationwide Corporation shareholders will vote upon a proposal to adopt an Agreement of Merger which provides for the merger of First Plaza with and into Nationwide Corporation. Upon the effective date of the merger, each outstanding Nationwide Corporation Class A Common share will be extinguished and the Class A Common shareholders of Nationwide Corporation will be entitled to receive $42.50 in cash for each share so extinguished. All of First Plaza's Common stock will be converted into the Class A Common stock of Nationwide Corporation. Thus, Nationwide Mutual will become the owner of all of the issued and outstanding Class A Common shares of Nationwide Corporation. (See "THE MERGER—Summary of the Merger Provisions.")

The terms of the merger, including the $42.50 per share amount, are the result of a proposal of Nationwide Mutual. The terms of the merger were reviewed and approved by Nationwide Corporation's Board of Directors. Prior to approving the merger, the Corporation's Board of Directors appointed a special Evaluation Committee consisting of five Class A Directors who were neither directors nor officers nor employees of Nationwide Mutual nor employees of the Corporation to consider the proposal. The Evaluation Committee recommended the merger as fair to the public shareholders of the Corporation. (See "SPECIAL FACTORS—Background and History of the Proposed Merger.")

Conditions and Termination—Notwithstanding shareholder approval, the Agreement of Merger is subject to certain conditions which, if not fulfilled, permit termination by the constituent corporations. (See "THE MERGER—Termination of the Merger.")

Vote Required—The affirmative vote of not less than a majority of the outstanding Nationwide Corporation Class A Common shares is required to adopt the Agreement of Merger. Nationwide Mutual owns 4,091,892

Class A Common shares (approximately 85.6% of the Class A Common share voting power of Nationwide Corporation) which it intends to vote in favor of the merger. (See "THE MERGER—Approval of the Agreement of Merger.")

Federal Income Tax Consequences—It is a condition to the consummation of the Agreement of Merger that a ruling be obtained from the Internal Revenue Service that there will be no gain or loss recognized by Nationwide Corporation, First Plaza, Nationwide Mutual Fire or by Nationwide Mutual in the transaction. Nationwide Corporation shareholders who receive cash in the merger will recognize gain or loss for federal income tax purposes. (See "THE MERGER—Federal Income Tax Matters.")

Purpose of the Merger

The purpose of the merger transaction is to eliminate the public ownership of Class A Common shares of Nationwide Corporation. This elimination of all Class A Common shareholders except Nationwide Mutual will alleviate potential conflicts of interest problems presented by the presence of minority shareholder interests in respect of transactions involving the Corporation and other companies affiliated with Nationwide Mutual. The proposed merger transaction will increase management flexibility in responding to rapidly changing conditions of the insurance and financial markets. The proposed merger will permit the management of Nationwide Mutual and its affiliated companies to simplify the management structure as a whole, thereby eliminating duplicative functions and consolidating management responsibility in a more efficient manner. The Corporation will no longer be required to incur costs of servicing its public shareholders. (See "SPECIAL FACTORS—Purposes of the Transaction.")

Effect of the Transaction

When the merger transaction is completed, First Plaza will cease having a separate corporate existence. The persons who are officers and directors of Nationwide Corporation prior to the transaction will continue as officers and directors after the transaction. Class A Common shareholders of Nationwide Corporation will receive, upon tender of their share certificates, $42.50 for each share owned. They will no longer be shareholders or have an interest in Nationwide Corporation. Class A Common shareholders other than Nationwide Mutual will recognize a short or long term gain or loss depending upon the date shares were purchased and upon the adjusted cost basis for such shares. Nationwide Corporation, Nationwide Mutual Fire and Nationwide Mutual have applied for an Internal Revenue Service ruling that their interest will not be affected by the merger transaction. (See "THE MERGER—Federal Income Tax Matters.")

Nationwide Corporation's Class A Common shares are registered with the United States Securities and Exchange Commission. If the proposed merger transaction is consummated, all of the Class A Common shares will be owned by Nationwide Mutual. The Corporation will then deregister its Class A Common shares. Thus, the Corporation will be relieved of certain filing requirements and disclosure requirements. Information concerning the Corporation and its activities will not normally be available to the general public. (See "SPECIAL FACTORS—General" and "SPECIAL FACTORS—Purposes of the Transaction.")

* * * *

Investment Banker's Opinion

Nationwide Corporation's directors considered important, as an indication of the fairness of the merger, the receipt of the written opinion of The First Boston Corporation that the consideration to be received by the

Class A Common shareholders of Nationwide Corporation in the merger is fair from a financial point of view. A copy of this written opinion is included in the Proxy Statement as EXHIBIT II. (See "SPECIAL FACTORS —Fairness of the Transaction.")

Market Prices

On November 2, 1982, the last business day before the principal terms of the merger were announced, the closing bid and asked prices as reported by the National Quotation Bureau Inc. were $28 and $28.75, respectively, for the Nationwide Corporation Class A Common shares. (See "MARKET PRICE AND DIVIDENDS.")

Litigation Involving the Transaction

On November 9, 1982, both Nationwide Corporation and Nationwide Mutual were served with suit papers filed by Ms. Belle Efros, owner of record of 51 Class A Common shares of Nationwide Corporation stock. Ms. Efros in separate complaints in the United States District Court for the Southern District of Ohio and in the Common Pleas Court of Franklin County, Ohio, seeks to enjoin the merger and seeks damages and other relief. In each case the plaintiff has alleged a class action on behalf of herself and all other Class A Common shareholders (other than the executive officers and directors of Nationwide Corporation, Nationwide Mutual, members of their families and entities controlled by them.) (See "BUSINESS AND OPERATIONS OF NATIONWIDE CORPORATION—Merger Litigation.") The defendants in these actions, Nationwide Mutual and Nationwide Corporation, will deny all allegations of wrongdoing or liability with respect to any and all of the facts or claims alleged by the plaintiff in the actions, and have decided to proceed with the merger. There is a provision in the Agreement of Merger that permits Nationwide Corporation or First Plaza to terminate the Agreement of

Merger in the event any litigation concerning the merger is continuing. (See "THE MERGER—Termination of the Merger.") The Evaluation Committee, after reviewing all relevant information and considering the opinion of The First Boston Corporation, believed that the consideration to be paid to the public shareholders in the merger is fair.

Dissenters' Rights

Section 1701.85 of the Ohio Revised Code provides, in effect, that a shareholder of Nationwide Corporation whose shares are not voted in favor of the merger is entitled, if the merger is consummated, to be paid the fair cash value of shares held of record by him on the date of record, if he serves a written demand therefor upon the Corporation on or before the tenth day following the shareholders' vote authorizing the merger and if he otherwise complies with such Section 1701.85. (See "APPRAISAL RIGHTS OF DISSENTING SHAREHOLDERS" and EXHIBIT III to this Proxy Statement.)

SPECIAL FACTORS

General

Nationwide Corporation is engaged in the business of holding substantial or controlling stock interests primarily in life insurance and financial services corporations. The Corporation has two classes of Common stock outstanding: Class A Common shares and Class B Common shares. The Class A Common shares are registered under the Securities Exchange Act of 1934 as amended ("Exchange Act") and are publicly traded in the over-the-counter market. (See "MARKET PRICE and DIVIDENDS.") Approximately 85.6% of the Class A Common shares are owned of record by Nationwide Mutual. Nationwide Mutual also owns approximately 91.3% of the outstanding Class B Common shares, and the remaining 8.7% of the Class B Common shares out-

standing are owned by Nationwide Mutual Fire, an affiliate of Nationwide Mutual. The Class B Common shares are not publicly traded. Pursuant to the Corporation's Amended Articles of Incorporation, the holders of each class of shares are currently entitled to elect six of the twelve directors on the Corporation's Board of Directors. Nationwide Mutual has the requisite holdings to elect all six Class A Directors, as well as all Class B Directors.

The Corporation and Nationwide Mutual have entered into an Agreement of Merger (the "Agreement") with First Plaza, a copy of which is attached to this Proxy Statement as EXHIBIT I. First Plaza is a wholly-owned subsidiary of Nationwide Mutual. If the Agreement is adopted by the shareholders of the Corporation, the Corporation will be merged with First Plaza with the result that the Corporation will become solely owned by Nationwide Mutual and Nationwide Mutual Fire, and the Class A Common shares will be converted into the right to receive $42.50 in cash, or the right to receive the "fair cash value" thereof under Section 1701.85, Ohio Revised Code. (See "THE MERGER—Summary of the Merger Provisions" and "APPRAISAL RIGHTS OF DISSENTING SHAREHOLDERS.") In a related transaction, the Corporation, Nationwide Mutual and Nationwide Mutual Fire have proposed a similar merger involving Nationwide Life Insurance Company ("Nationwide Life"), the corporation's principal operating subsidiary, with the result that Nationwide Life would become solely owned by the Corporation, Nationwide Mutual and Nationwide Mutual Fire. In that transaction, the public shareholders of Nationwide Life would receive $85.00 per share in cash. (See "RECENT DEVELOPMENTS.")

Because the Corporation's Class A Common shares are registered under Section 12(g) of the Exchange Act, the Corporation is presently subject to numerous regula-

tions which, among other things, require the filing of various reports with the United States Securities and Exchange Commission and timely disclosure of certain information concerning the Corporation to shareholders and the public. If the proposed merger is consummated, all shares outstanding will be owned by Nationwide Mutual and Nationwide Mutual Fire. The Corporation will then deregister its Class A Common shares under the Exchange Act, and the Corporation will no longer be obliged to comply with certain provisions of the Exchange Act.

Background and History of the Proposed Transaction

Nationwide Mutual and Nationwide Mutual Fire have owned all of the outstanding Class B Common shares since their original issuance in 1955. Prior to December, 1978, all of the outstanding Class A Common shares were owned by public shareholders. In December, 1978, Nationwide Mutual offered to purchase from the holders of the Class A Common shares any and all Class A Common shares tendered to it, up to 2,500,000 shares, at a price of $20.00 per share net in cash, with an option on behalf of Nationwide Mutual to purchase any additional shares tendered in excess of 2,500,000. In response to the tender offer, the holders of the Class A Common shares tendered 4,074,695 shares, and Nationwide Mutual purchased all such Class A Common shares in January, 1979. Nationwide Mutual purchased no Class A Common shares in 1980. In 1981, Nationwide Mutual purchased 17,127 Class A Common shares at prices ranging between $22.50 and $24.62. The average prices paid per quarter in 1981, were $22.50, $23.12, $23.50 and $24.50, respectively. Nationwide Mutual bought 58 Class A Common shares in March, 1982, for $23.12 per share and 12 Class A Common shares in July, 1982, for $23.25 per share. These purchases brought Nationwide Mutual to its present position with respect to ownership of the Class A Common shares.

In September, 1982, certain officers of Nationwide Mutual informally approached the President of the Corporation proposing the transaction. They discussed in general terms the possibility of an acquisition by Nationwide Mutual of the remaining publicly held Class A Common shares of the Corporation for cash. They also proposed effecting a similar acquisition with respect to the outstanding publicly held shares of stock of Nationwide Life, the principal operating subsidiary of the Corporation. (See "RECENT DEVELOPMENTS.") In each transaction, Nationwide Mutual proposed that the public shareholders would receive cash for their shares. The President subsequently contacted the two other members of the Executive Committee of the Board of Directors of the Corporation who were not directors, officers or employees of Nationwide Mutual or Nationwide Mutual Fire. The President reported on his discussions concerning the proposal. Following their preliminary discussions, those unaffiliated members of the Corporation's Executive Committee retained independent legal counsel to advise them in respect of the proposal and to represent the interest of the public shareholders of the Corporation.

At a special meeting of directors held on November 2, 1982, the directors of the Corporation were advised that on the following day the Investment Committee of Nationwide Mutual's Board of Directors would recommend to its full board, and Nationwide Mutual's Board of Directors would consider, a proposal which, if made and accepted, would provide for the merger of the Corporation and First Plaza, a newly created, wholly-owned subsidiary of Nationwide Mutual. As part of the proposal, the Corporation would become a wholly-owned subsidiary of Nationwide Mutual and Nationwide Mutual Fire, and the Corporation's public shareholders would receive $42.50 per share in cash for the Class A Common shares. The Corporation's directors were advised that the price

to be paid to the public shareholders for their shares had been set by Nationwide Mutual's Investment Committee to reflect the fair value thereof as determined by The First Boston Corporation ("First Boston.")

Immediately thereafter, the Board of Directors of the Corporation appointed a special Evaluation Committee, consisting of the Corporation's five Class A Directors who are neither directors, officers nor employees of Nationwide Mutual or Nationwide Mutual Fire, nor employees of the Corporation, to consider the proposal and to make a recommendation in respect thereof to the full board. The Evaluation Committee was given full authority to hire any professional advisers which it deemed necessary to fulfill its responsibility.

The Evaluation Committee then met that morning to consider engagement of independent counsel to represent the interests of the public shareholders and to advise the Evaluation Committee in respect of the proposed merger. The Evaluation Committee determined to retain the special counsel previously engaged to advise the unaffiliated members of the Executive Committee in respect of the proposal, and immediately thereafter met with such independent counsel to consider the proposal. Counsel advised the members of the Evaluation Committee of their fiduciary responsibilities to the public shareholders, and recommended that the Evaluation Committee meet with representatives of First Boston to consider the adequacy of the price from a financial point of view. Counsel also advised the Evaluation Committee of the need to consider, and the Evaluation Committee considered the statements of officers of both the Corporation and of Nationwide Mutual in respect of the existence of a proper business purpose for such a transaction.

On the afternoon of November 2, 1982, the Evaluation Committee met with representatives of First Boston, who at that time reported to the members of the Evaluation

Committee that in First Boston's opinion, the proposed price of $42.50 per share was fair to the public shareholders of the Corporation from a financial point of view. (See "SPECIAL FACTORS—Opinion of The First Boston Corporation.") A copy of the opinion of First Boston is attached to this Proxy Statement as EXHIBIT II. After further consultation with counsel in respect of the proposal, and after reviewing in detail the report of First Boston in respect of the fairness of the proposed price, and discussing with representatives thereof the terms of its engagement and the scope of its opinion, the Evaluation Committee determined to recommend to the full Board of Directors of the Corporation that the Corporation accept Nationwide Mutual's proposal if made on the terms presented to the Evaluation Committee.

On the following day, November 3, 1982, the Board of Directors of the Corporation met in joint session with the Boards of Directors of Nationwide Mutual and Nationwide Mutual Fire, and Nationwide Mutual formally presented the proposal to the Corporation. Mr. Sollars, a Class B Director was absent from the meeting. The joint session was addressed by representatives of First Boston in respect of the proposed price payable to the public shareholders of the Corporation for their Class A Common shares, and the proposed price payable to the public shareholders of Nationwide Life for their shares in a similar transaction. (See "RECENT DEVELOPMENTS.") Upon review of the report of First Boston at the joint session, and based upon the recommendation of the Evaluation Committee in respect of the proposal, the Board of Directors of the Corporation unanimously voted to enter into an agreement of merger with First Plaza, a wholly-owned subsidiary of Nationwide Mutual, whereby the Corporation would become solely owned by Nationwide Mutual and Nationwide Mutual Fire, and the public shareholders of the Corporation would receive $42.50 in cash for their Class A Common shares. Pursuant thereto, the Corporation, Nationwide Mutual and

First Plaza entered into the Agreement of Merger attached as EXHIBIT 1 to this Proxy Statement.

Purposes of the Transaction

Managements of both the Corporation and Nationwide Mutual believe that the proposed merger has several different purposes, the accomplishment of which will be advantageous to the Corporation, Nationwide Mutual, Nationwide Mutual Fire, and their affiliates. Many of the following purposes likewise apply to the proposed elimination of the public shareholder interests in Nationwide Life. (See "RECENT DEVELOPMENTS.")

First, management believes that the elimination of public shareholder interests in the Corporation and Nationwide Life will alleviate potential conflict of interest problems presented by the presence of minority shareholder interests in respect of transactions involving the Corporation and one or more of its affiliates (collectively, the "Nationwide Companies"). Economic costs and practical difficulties are inherent in properly allocating revenues, expenses and business opportunities among the various Nationwide Companies in a manner that is fair to the Corporation's and Nationwide Life's public shareholders. The proposed mergers will eliminate the need for management of the various Nationwide Companies to be concerned with the effect of the allocation of revenues, expenses and business opportunities upon the interests of public shareholders. In addition, the proposed merger will reduce certain costs and delays presently experienced by the Nationwide Companies which are associated with retaining outside consultants, accountants and others to value transactions among the Nationwide Companies to determine if such transactions are fair to the public shareholders.

Second, management believes that the proposed merger will increase management flexibility in responding to the

rapidly changing conditions of the insurance and financial markets. As the insurance and financial markets of today become increasingly competitive, management flexibility in offering new or improved products and services in a timely manner will be an important factor in determining a company's profitability. The managements of both the Corporation and Nationwide Mutual believe that removal of minority interests from the Corporation and Nationwide Life will substantially increase management's ability to react quickly and effectively in the marketplace.

Third, management believes that the elimination of public shareholder interests in both the Corporation and Nationwide Life will permit the management of the Nationwide Companies to simplify the management structure of the Nationwide Companies as a whole, eliminating certain duplicative functions and consolidating certain management responsibilities in a more efficient manner. The result of such changes will be to reduce expenses for the Nationwide Companies as a whole, and to centralize certain decision-making functions for the benefit of all the Nationwide Companies.

Fourth, if the proposed merger is consummated the Corporation will no longer be required to incur the substantial costs of servicing its public shareholders. Specifically, the Corporation will realize economies from the elimination of stock transfer, shareholder proxy solicitations and mailing expenses. Additionally, the Corporation will not be required to develop and maintain a system for withholding taxes on shareholder dividends beginning July 1, 1983, as mandated for publicly held companies such as the Corporation. Finally, the elimination of public shareholders will permit the Corporation to deregister its Class A Common shares under the Exchange Act, with the result that the Corporation will no longer be required to prepare and file periodic reports and other materials with the Commission, thus effecting further legal, accounting and other cost savings for the Corporation.

Nationwide Corporation and Nationwide Mutual have not placed a monetary amount on the benefits to be derived from the proposed transaction. Initial out-of-pocket savings to Nationwide Corporation are estimated to be $300,000 per year. The effect of the transaction to Nationwide Mutual is immaterial to its operations. Nationwide Mutual carries its investment in Nationwide Corporation at the statutory book value of that investment. To the extent that the carrying value per share of the shares acquired is less than $42.50, the deficiency will be recorded as goodwill and amortized over a ten year period. The estimated amount of goodwill based on the carrying value of Nationwide Corporation shares at September 30, 1982 is approximately $12,500,000.

Managements of Nationwide Mutual and the Corporation considered alternative means of accomplishing the above described purposes, but they believe that the merger as proposed is the most direct and expeditious method available for accomplishing such purposes. Nationwide Mutual rejected the possibility of a further tender offer for the Corporation's Class A Common shares (see "SPECIAL FACTORS—Background of the Transaction") because such a tender offer might not result in the tender of sufficient shares to permit the Corporation to eliminate the costs associated with being a publicly held company, and because a tender of less than all Class A Common shares would not permit the Corporation to realize the other goals of increased flexibility, elimination of potential conflict of interest problems, and the like, as discussed above.

Nationwide Mutual proposed the merger at this time because of its belief that the position of the Nationwide Companies in the insurance industry requires them to increase flexibility and maximize cost savings to maintain their competitive position in the industry.

Opinion of The First Boston Corporation

In reaching the conclusion that the price payable to the Corporation's public shareholders is fair, both the Evalu-

ation Committee and the Board of Directors of the Corporation received, reviewed and relied upon the advice of The First Boston Corporation, a financial expert. First Boston originally proposed the $42.50 price as the payment to be made to the holders of the publicly held Class A Common shares in the merger transaction.

In September, 1982, First Boston was first requested by Nationwide Mutual to evaluate and recommend to the Corporation a fair and equitable per share price to be paid to the Corporation's public shareholders as part of a merger whereby the holders of the publicly held Class A Common shares would receive cash and Nationwide Mutual and Nationwide Mutual Fire would become the only shareholders of the Corporation. First Boston was simultaneously asked to evaluate and recommend a fair and equitable price for the publicly held shares of Nationwide Life in a similar transaction. Thereafter, First Boston was formally retained on October 19, 1982.

As part of its investment banking business, First Boston is regularly engaged in the valuation of businesses and their securities in connection with mergers and acquisitions, negotiated underwritings, secondary distributions of listed and unlisted securities, private placements and valuations for estate, corporate and other purposes. First Boston was selected because, in addition to its general qualifications and experience, it had been employed by the Nationwide Companies as financial advisor in several financial matters in the recent past, including contemplated sales of commercial paper for Nationwide Life in 1980, and advising Nationwide Mutual in respect of Nationwide Mutual's tender offer for the Corporation's Class A Common shares in 1978. (See "SPECIAL FACTORS—Background and History of the Proposed Transacton.") First Boston was therefore already familiar with the Corporation from a financial point of view.

First Boston commenced its review of the Corporation's business on approximately September 28, 1982, and ad-

vised management of the Corporation and Nationwide Mutual on October 28, 1982, that in its opinion a fair and equitable price for the Corporation's publicly held Class A Common shares would be $42.50 per share. Representatives of First Boston subsequently met with the Corporation's Evaluation Committee on November 2, 1982, and with the full Board of Directors on November 3, 1982, and delivered to each of them First Boston's written opinion, dated November 1, 1982, that the financial terms of the proposed merger were fair to the minority shareholders of the Corporation. A copy of this opinion is attached to this Proxy Statement as EXHIBIT II and should be read in its entirety. No other or further opinion as to the fairness of the proposed merger has been or will be requested. First Boston has agreed, however, to advise the Corporation, as of the mailing of this Proxy Statement and as of the date immediately preceding the effective date of the merger, if in its judgment circumstances arise which would require the withdrawal of its opinion that the financial terms of the proposed merger are fair to the public shareholders. (See "THE MERGER—Termination of the Merger.")

In arriving at its written opinion as to the fairness of the merger, First Boston reviewed, among other matters it deemed relevant, (i) certain business and financial data of the Corporation specifically furnished by management for the purpose of enabling First Boston to opine as to the fairness of the proposed merger; (ii) certain publicly available financial and other information in respect of the Corporation; (iii) the trading volume and historical stock prices of the Class A Common shares; and (iv) the terms and conditions of the proposed merger as compared with the terms and conditions of comparable transactions. In addition, representatives of First Boston met with senior management of the Corporation to discuss the business, operations and prospects of the Corporation. First Boston conducted a similar review in re-

spect of Nationwide Life, the Corporation's principal operating subsidiary. First Boston's opinion was given in reliance upon the Corporation's representation that the information furnished by management was complete and accurate in all material respects. First Boston did not independently verify the information.

Nationwide Mutual has agreed to pay First Boston a fee of $175,000 in connection with the proposed merger. In addition, Nationwide Mutual has agreed to pay all reasonable out-of-pocket expenses, including fees and disbursements of First Boston's counsel. Nationwide Mutual has agreed to idemnify First Boston and its affiliates against certain liabilities and expenses in connection with its opinion. Nationwide Mutual, along with Nationwide Corporation and Nationwide Mutual Fire, have agreed to reimburse Nationwide Life for First Boston's fee of $25,000 plus expenses in connection with First Boston's engagement in the proposed Nationwide Life merger transaction and Nationwide Life's indemnity of First Boston and its affiliates against certain liabilities and expenses in connection with its expenses. (See "RECENT DEVELOPMENTS.") In 1980, a subsidiary of Nationwide Mutual engaged First Boston to evaluate certain acquisition candidates. In connection with this evaluation, First Boston received a fee of $50,000. In 1980, 1981 and during the first ten months of 1982, Nationwide Mutual, Nationwide Mutual Fire, Nationwide Life and Nationwide Corporation paid total fees and direct commissions to broker dealers in the amounts of $522,955, $536,614 and $373,671, respectively. Of these amounts $50,315 in 1980, $55,061 in 1981 and $13,240 during the first ten months of 1982 were paid to First Boston in a broker-dealer capacity. In addition, these companies dealt with First Boston in transactions in which First Boston was the principal or underwriter. All fees and direct commissions paid and all purchases and sales of securities were made in the usual, ordinary and normal course of business.

Although First Boston was originally requested to undertake this engagement by representatives of Nationwide Mutual, First Boston has advised the Corporation and the Evaluation Committee that from the inception of the proposed merger it understood and considered itself to be in a client relationship with the Corporation and any committee of the Board of Directors selected to represent the interests of the holders of the publicly held Class A Common shares. First Boston's instructions in respect of the engagement were to establish a fair and equitable value for the publicly owned Class A Common shares of the Corporation. No limitation was imposed upon the scope of First Boston's investigation in connection with either establishing a fair value for the Class A Common shares or opining that the financial terms of the proposed merger are fair to the public shareholders.

Fairness of the Transaction

At a meeting held on November 3, 1982, the eleven members of the Board of Directors of the Corporation who were present voted unanimously to approve the principal terms of the proposed merger and to recommend approval of the proposed merger to the Corporation's shareholders, believing it to be in the best interests of the Corporation and its shareholders. One Class B Director was absent from the meeting. In so doing, the directors considered important, (i) the various business purposes addressed by management which the proposed merger will accomplish (see "SPECIAL FACTORS—Purposes of the Transaction"); (ii) the written opinion of First Boston to the effect that the financial terms of the proposed merger were fair to the public shareholders of the Corporation (a copy of which is attached to this Proxy Statement as EXHIBIT II); and (iii) the report of the Evaluation Committee, that it believed the financial terms of the proposed merger to be fair to the public shareholders, based upon both First Boston's opinion and

its review with representatives of First Boston of the terms and conditions of First Boston's engagement, and the scope of its investigation in giving the opinion.

The Evaluation Committee carefully reviewed with representatives of First Boston the terms of its engagement in this matter, particularly in respect of its relationship with Nationwide Mutual. The members of the Evaluation Committee concluded that, based upon its discussions with such representatives, it was appropriate in this case to rely upon First Boston's valuation and opinion in determining the fairness of the financial terms of the proposed merger to the public shareholders.

The members of the Evaluation Committee believe that, from a financial point of view, the terms of the proposed merger are fair to the public shareholders of the Corporation. The committee members considered important, as an indication of the fairness of the proposed merger, the receipt of the written opinion of First Boston. The committee members also considered important a number of other factors discussed with the representatives of First Boston. These factors are the current market price of the Class A Common shares as compared with stock prices of other comparable entities; past and current earnings of the Corporation; past and current price/earnings ratios of the Corporation and other companies having similar operations; past and current price/equity ratios of the Corporation (as computed in accordance with generally accepted accounting principles); and the premium over market price offered to the public shareholders in this transaction as compared to recent premiums paid to minority shareholders in other similar transactions as well as in other recent acquisitions in the life insurance industry generally. In its discussions with the representatives of First Boston, upon whose opinion the Evaluation Committee has concluded that it is appropriate to rely, these representatives stated that in addition to the above noted factors they had also considered the current

overall level of the stock market; historical market prices of the Class A Common shares as compared with market prices for the stock of other comparable entities; going concern value of the Corporation; net book value of the Corporation; liquidation value of the Corporation; various financial ratios; present revenues, expenses, earnings and dividends of the Corporation and trends with respect thereto; the purchase price paid to holders of Class A Common shares by Nationwide Mutual in connection with the December 1978 tender offer for the Class A Common shares; present value of projected future cash flows of the Corporation; replacement value of the Corporation; off balance sheet items of the Corporation; significant trends in the insurance business; competitive environment of the insurance industry; regulatory environment of the insurance industry; and the impact of inflation on the Corporation.

Although the Evaluation Committee did not give specific weight to each of the various factors considered in evaluating the fairness of the proposed merger, particular emphasis was placed upon the receipt of the opinion of First Boston.

The members of the Evaluation Committee believed it to be particularly important that the price to be paid to the public shareholders for their Class A Common shares ($42.50 per share) represented a premium over the quoted bid price of the Class A Common shares on the next to last trading day prior to the public announcement of the proposed merger on November 3, 1982, as reported by the National Quotation Bureau Inc.

In evaluating the overall fairness of the proposed merger, the Evaluation Committee also considered it significant that First Boston would notify the Corporation on the date hereof and on the date immediately preceding the effective date of the merger if events render the financial terms of the proposed merger unfair to the public

shareholders; that the Corporation's Class A Directors (five out of six of whom constitute the Evaluation Committee) would have the authority under the Agreement to terminate the Agreement if a majority of public shareholders voting at the special meeting of shareholders fail to approve the proposed merger; that the terms of the Agreement were negotiated by independent legal counsel retained by the Evaluation Committee; that the Agreement may be terminated in the event the Corporation receives, prior to the special meeting of shareholders, a bona fide offer to acquire the publicly held Class A Common shares which offer, in the judgment of the Class A Directors, is more favorable to the public shareholders than the proposed merger; and that the Evaluation Committee had been given full authority to evaluate, make recommendations regarding and respond to offers made or proposed to be made to the Corporation by Nationwide Mutual or any of its affiliates. The Evaluation Committee consisted solely of Class A Directors of the Corporation who are neither directors, officers nor employees of Nationwide Mutual or Nationwide Mutual Fire, nor officers or employees of the Corporation.

To the knowledge of the Corporation and Nationwide Mutual, no firm offers were made during the past two years by any person, other than Nationwide Mutual in the proposed transaction, to acquire the Corporation, directly or indirectly. The Board of Directors of Nationwide Corporation and the Board of Directors of Nationwide Mutual reasonably believe that the proposed merger transaction is fair to the public shareholders of Nationwide Corporation.